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No. _____

In The

Supreme Court of the United States

October Term, 1984

COX ENTERPRISES, INC. d/b/a
THE AUSTIN AMERICAN-STATESMAN,
Petitioner,

vs.

THE HONORABLE G. P. HARDY, JR., DISTRICT JUDGE, 130TH DISTRICT COURT, MATAGORDA COUNTY, TEXAS, SERVING BY SPECIAL APPOINTMENT,
Respondent,

BROWN & ROOT, INC. AND THE HALLIBURTON COMPANY,
Real Parties in Interest.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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January 14, 1985

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the right guaranteed by the First and Fourteenth Amendments to the public to have information about the courts is fundamentally different in civil cases from the right to access to information in criminal cases.

2. Whether the First and Fourteenth Amendments provide the public and the press with a right to have parties, witnesses, and lawyers who participate in important civil litigation to which local governmental entities are parties free to disclose nonconfidential information learned during the discovery process.

3. Whether the First and Fourteenth Amendments prohibit the entry of an order, in a case involving issues of legitimate public concern, that prohibits parties, witnesses, and lawyers from disclosing to the press nonconfidential information learned as a result of the discovery process without a showing of "good cause" that would satisfy the requirements of Rule 26(c), Federal Rules of Civil Procedure.

4. Whether the First and Fourteenth Amendments prohibit the entry of an order in a civil case, involving issues of legitimate concern, that deny access to all judicial records of discovery without a showing of "good cause" that would satisfy the requirements of Rule 26(c), Federal Rules of Civil Procedure.

PARTIES TO THE PROCEEDING BELOW

Petitioner is Cox Enterprises, Inc. d/b/a *The Austin American-Statesman.*

Respondent is The Honorable G. P. Hardy, Jr., District Judge, 130th District Court, Matagorda County, Texas, Serving by Special Appointment.

Real Parties in Interest are Brown & Root, Inc., and The Halliburton Company.

Other Interested Parties are Houston Power and Light, Central Power and Light, and the City of Austin.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

PETITION FOR WRIT OF CERTIORARI

The Petitioner respectfully prays that a writ of certiorari be issued to review the order of the Texas Supreme Court of October 17, 1984.

OPINION BELOW

The opinion of the Texas Court of Appeals Thirteenth Supreme Judicial District is reported at 678 S.W.2d 495

and is found in the Appendix at pages 5-35. The Supreme Court of Texas did not issue an opinion with its order of October 17, 1984.

JURISDICTION

The Texas Supreme Court entered an order on October 17, 1984 denying Petitioner's Application for Leave to File a Petition for Writ of Mandamus. The Petition for Writ of Certiorari has been filed within ninety days thereafter. The Court's jurisdiction is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

This case involves portions of the First and Fourteenth Amendments to the Constitution of the United States, which provide as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const., amend. I.

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of

law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const., amend. XIV, § 1.

The case also involves portions of Rule 186b of the Texas Rules of Civil Procedure, which provides in part:

> After notice is served for taking a deposition on written questions or by oral examination, upon motion seasonably made by any party or by the person to be examined and upon notice and for good cause shown, the court in which the action is pending may enlarge or shorten the time for taking the deposition, or may make an order that the deposition shall not be taken, or that it may be taken only before the court or at some designated place other than that stated in the notice or subpoena, or that it may be taken only on written questions, or that it may be taken only on oral examination, or that certain matters shall not be inquired into, or that the examination shall be held with no one present except the witness and his counsel and the parties to the action and their officers and counsel, or that the deposition shall not be taken by or before the officer designated, or that after being sealed the deposition shall be opened only by order of the court or that secret processes, developments or research need not be disclosed, or that the parties shall simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court; or the court may make any other order which justice requires to protect the party or witness from undue annoyance, embarrassment, oppression or expense.[1]

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1. Rule 186b which was in effect at the time the trial court entered its oral order on October 11, 1983 and the written order complained of on December 29, 1983, was repealed by the Texas Supreme Court effective April 1, 1984. Rule 166b4, Texas Rules of Civil Procedure. *See* note 6, *infra*.

STATEMENT OF THE CASE

Petitioner is the owner of *The Austin American-Statesman,* a daily newspaper published in Austin, Texas. It seeks to have this Court overturn an order entered by the Texas district court in Matagorda County that prohibits the district clerk and all the participants in a civil case concerning the construction of a nuclear power plant from disclosing to third parties any information learned during discovery. In 1972 the City of Austin, which owns and operates the facilities that supply electricity to Austin and the surrounding metropolitan area, entered into an agreement with the City of San Antonio, which also owns and operates the local electric system, Houston Light and Power ("HL&P") and Central Power and Light ("CP&L") to construct a nuclear power plant to supply electricity to much of south and central Texas. These owners entered into a contract with Brown & Root, Inc., a major international engineering and construction company based in Texas, to build the plant ("STNP") in Matagorda County on the Texas coast about fifteen (15) miles from the small town of Bay City about 170 miles from Austin.[2] The STNP has experienced serious delays and cost overruns. Its projected cost has risen from $1 billion to about $5.5 billion.

In 1982 Austin and the other owners sued Brown & Root and its parent, The Halliburton Company, in Texas

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2. Of the 35,000 residents of Matagorda County, only one subscribes to Petitioner's newspaper. He gets only the Sunday edition.

state court in Matagorda County. The owners alleged that Brown & Root breached the contract, violated a Texas statute barring deceptive trade practices, and committed various common law torts, including fraud. Brown & Root and Halliburton denied the claim, suggesting that the problems with the STNP are largely the product of mismanagement by the owners. Defendants filed a counterclaim seeking damages for breach of the contract by the owners.

Extensive discovery has taken place. Well over one hundred depositions have been taken, several sets of interrogatories consisting of hundreds of questions have been served and answered. Prior to October 11, 1983, this discovery had taken place in public in the sense that interrogatories and the answers, requests for admissions and responses, and document requests and responses were filed in the public record and the parties, witnesses, and attorneys were free to discuss the nonconfidential information learned. The court, however, had entered four orders protecting confidential information produced during the discovery process.

On October 11, 1983, after being told by a lawyer for Halliburton that he had been called by a newspaper reporter who wanted information about the case, the court ordered that "no evidence should be given to the media." (App. 39.) Halliburton subsequently made an oral motion requesting that the October 11 verbal order be in writing. A hearing was held on November 17, 1983 at which time a lawyer for Petitioner appeared and argued that no reason had been shown for making all of the discovery secret. Halliburton, the moving party, was required to make no showing, and there was no showing, that secrecy was

needed to protect any interest. There were no facts or circumstances that were claimed to be the basis for the request: no previous publicity was pointed out, no special facet of this case was relied on; there was nothing except the legal argument that the court had the inherent power to control the conduct of discovery and that power included the power to order all participants to keep all the information learned during discovery secret. (App. 43-65.)

On December 29, 1983, the Matagorda County court entered a protective order which made no reference to any showing by any party, but which did take "judicial notice" that Bay City, Texas is a small town, notice that the issues in the case were "unusually emotional," notice of the pre-trial status of the case, notice of the "complexity of the suit," notice of the "enormous number of documents involved, which, if selectively disclosed to third parties by the parties or their attorneys, could present materially false impressions as to the merits of the claims . . . and interfere with the right to a fair trial." Finally, the court took judicial notice that in spite of his October 11 order, "third parties have sought to obtain access to the depositions taken in the case." The court reached the legal conclusion that "third parties have no constitutional nor common law right of access to pretrial documents obtained through the discovery process in a civil case" and that "all parties to this cause have a constitutional right to a fair trial." (App. 2.)

The order provided that all "parties, attorneys, experts employed by the parties, court reporters, clerks and officers of the Court shall refrain from disclosing to third

parties information obtained through the Court's discovery processes." The order also required that depositions, interrogatories and their answers be filed under seal and be opened only after an order from the court. The court did provide, however, that third parties could attend "any live sessions before the Court" and that the order did not cover pleadings, briefs and legal memoranda.

On January 3, 1984, Petitioner, along with the City of Austin, the City of San Antonio, and another newspaper, filed motions for leave to file a petition for a writ of mandamus asking the Texas Court of Appeals for the Thirteenth Supreme Judicial District to set aside the December 29, 1983 order. The court of appeals granted the motion for leave and heard oral argument on February 2, 1984. On April 12, 1984, that court issued an opinion upholding the order. (App. 5-35.) A motion for rehearing was timely filed and overruled and on July 12, 1984, Petitioner filed a motion for leave to file a petition for a writ of mandamus with the Texas Supreme Court, which denied the motion without comment on October 17, 1984.

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REASONS FOR GRANTING THE WRIT

Review on certiorari is merited under Rule 17.1 of the Supreme Court. The decision below that the right of third parties to access to information about civil litigation is fundamentally different from their right to information about criminal cases is in conflict with the decisions of several federal courts of appeals. Moreover, the decision below that nonparties to civil litigation have no rights protected by the First and Fourteenth Amendments

in litigants being free to discuss nonconfidential information learned during discovery is in conflict with the decision of the United States Court of Appeals for the First Circuit in *In re San Juan Star Co.*, 662 F.2d 108 (1st Cir. 1981) and the decision of the United States Court of Appeals for the Sixth Circuit in *CBS, Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975). In addition, the decision of the courts below that in an important civil case involving issues of significant public interest, a trial court can order nonconfidential, nonprivate information learned during discovery be kept secret without a specific factual showing that would satisfy the "good cause" requirement of Federal Rule of Civil Procedure 26(c) is a departure from and inconsistent with the recent decisions of this Court on the First Amendment right of access, particularly where the trial court's order denied the public access to the nonconfidential, nonprivate information found in its own historically public files and records. Finally, the right of the public, including the press, in having participants free to discuss nonconfidential information learned during discovery in civil litigation, which involves great public interest, is a fundamental issue of federal law which has not yet been resolved by this Court, but should be.

I.

THE DECISION BELOW IS IN CONFLICT WITH DECISIONS OF SEVERAL COURTS OF APPEALS IN HOLDING THAT THE RIGHT OF ACCESS TO INFORMATION ABOUT CIVIL LITIGATION IS FUNDAMENTALLY DIFFERENT FROM THE RIGHT OF ACCESS TO INFORMATION ABOUT CRIMINAL LITIGATION.

A. The Litigation Involved is of Immense Public Importance.

This case arises out of a dispute concerning the construction of a nuclear power plant. The evidence in the case will relate to how well those charged with the responsibility of constructing the plant carried out their obligations not only to build the plant on time and for a reasonable cost, but to build it so that it will operate safely. The evidence in the case will also relate to how well those who have had responsibility for making the largest single expenditure in the history of the City of Austin have carried out their obligations and will relate to how well officials of HL&P who seek to have permission to operate this plant when it goes on line have managed this most important project. The pleadings reflect serious charges of negligence and breaches of duty by all sides.

Petitioner publishes a daily newspaper in the City of Austin, *The Austin American-Statesman.* The vast majority of its readers are both customers of Austin's electric department and Austin voters. Austin's participation in the STNP has been the single most important political issue in the city in the last twelve (12) years. There have been seven[3] elections in which citizens have been asked to

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3. *September 9, 1972:* Austin voters defeat bond propositions to invest $289 million in nuclear project. *November 17, 1973:* Austin voters authorize $161 million to participate in STNP. *August 14, 1976:* Austin voters turn down proposal authorizing the sale of the city's share of the STNP. *January 20, 1979:* Austin voters reject a $161 million limit on the STNP. *April 7, 1979:* Austin voters authorize spending additional $215.8 million and defeat a proposition to sell the city's share of the STNP. *November 3, 1981:* Austin voters authorize the City Council to sell the city's share of the STNP. *January 15, 1983:* Austin voters authorize the sale of $97 million in bonds to make nuclear plant payments.

approve bonds to be sold to fund the city's obligations or to approve the continued participation in the project. The $400 million the City of Austin has already spent on the project is about forty percent (40%) of the city's entire indebtedness and the city must pay approximately $1.5 million a week to keep up its payments. Although not one volt of electricity has been generated, about twenty percent (20%) of the electric bill Austin residents pay each month goes to pay the city's obligations arising from the STNP.

The public, particularly people who live in Austin and read Petitioner's newspaper, clearly have a legitimate interest in the facts in this case. This is not a case in which personal, family affairs or other information normally considered intimate and private are involved. While four of the parties to the case are corporations, the other two are cities upon which the cost of the litigation and the potential results of the case have tremendous impact. And the Texas courts' judgments and determination of liability will have tremendous impact on not only the stockholders and employees of HL&P, CP&L, Brown & Root, and Halliburton, and the citizens of Austin and San Antonio, but also on the people to be served by the plant and the residents who live near the plant.

The legitimacy of the public's interest in this litigation is great and in fact greater than it would be for most criminal proceedings.

B. The First and Fourteenth Amendments Guarantee the Same Right of Access to Information About Civil Litigation Involving Legitimate Public Interest as it Does Criminal Litigation.

The Texas Court of Appeals began its analysis with the conclusion that this Court's decisions recognizing a

right guaranteed by the First Amendment to third parties, usually the press, to access to information about criminal litigation are not applicable to civil cases. That conclusion is in error. While this Court has dealt with the issue of First Amendment rights of the public to information about litigation only in the criminal cases,[4] the reasoning expressed in these cases strongly suggests that such a right of access to information exists in civil cases. "Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open." *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555, 580, n. 17 (1980) (plurality op. of Burger, C.J.). *See also id.* at 596 (Justice Brennan's concurring opinion referring to the value of open proceedings in civil cases.)

The Texas courts' conclusion that the First Amendment right to access to information does not apply to civil cases is in conflict with conclusions of several federal courts of appeals: *Publicker Industries, Inc. v. Cohen,* 733 F.2d 1059, 1068-70 (3d Cir. 1984); *In re Continental Illinois Securities Litigation,* 732 F.2d 1302, 1308-09 (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. F.T.C.,* 710 F.2d 1165, 1177-79 (6th Cir. 1983), *cert. denied,* — U.S. —, 104 S. Ct. 1595 (1984); *Joy v. North,* 692 F.2d 880, 893 (2d Cir. 1982), *cert. denied,* 460 U.S. 1051, 103 S. Ct. 1498 (1983); *Chicago Council of Lawyers v. Bauer,* 522 F.2d 242, 258 (7th Cir. 1975), *cert. denied,* 427 U.S. 912 (1976).

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4. Press-Enterprise Co. v. Superior Court, — U.S. —, 104 S. Ct. 819 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Gannett Co., Inc. v. DePasquale, 443 U.S. 368 (1979).

The Sixth Circuit accurately stated the reasons the First Amendment right of access to information about the judicial proceeding applies in civil cases when it said:

> The policy considerations discussed in *Richmond Newspapers* apply to civil as well as criminal cases. The resolution of private disputes frequently involves issues and remedies affecting third parties or the general public. The community catharsis, which can only occur if the public can watch and participate, is also necessary in civil cases. Civil cases frequently involve issues crucial to the public—for example, discrimination, voting rights, antitrust issues, government regulation, bankruptcy, etc.

Brown & Williamson Tobacco Corp. v. F.T.C., supra, 710 F.2d at 1179.

II.

THE DECISION BELOW THAT THIRD PARTIES HAVE NO RIGHTS PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS IN PARTIES AND OTHER PARTICIPANTS IN CIVIL LITIGATION INVOLVING THE PUBLIC INTEREST BEING FREE TO DISCLOSE NONCONFIDENTIAL INFORMATION LEARNED DURING DISCOVERY IS FUNDAMENTALLY INCONSISTENT WITH THE DECISIONS OF THS COURT AND IS IN CONFLICT WITH THE DECISIONS OF TWO FEDERAL COURTS OF APPEAL.

The fundamental legal proposition underlying the trial court's order is its conclusion that "third parties have no constitutional nor common law right of access to pretrial documents obtained through discovery." (App. 2.) The Texas Court of Appeals concurred in the trial court's holding that nonparties had no right guaranteed by the First Amendment to challenge orders such as the one at

issue here. That court drew a sharp distinction between the news media's First Amendment rights and those of the parties. (App. 15, 34.) This distinction is inconsistent with the decision in *In re San Juan Star Co.*, 662 F.2d 108 (1st Cir. 1981) and *CBS, Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975).

In *In re San Juan Star* the Court of Appeals for the First Circuit dealt with an order in a civil case arising out of the deaths of members of a radical pro-independence group killed in a gun battle with Puerto Rican police. That order like the one in this case prohibited participants in the litigation from revealing the content of depositions to third parties. The First Circuit reviewed the order on an appeal brought by the *San Juan Star*, as well as the appeal of parties to the case. The first conclusion reached by the court of appeals was that the newspaper's First Amendment interest was affected by the order as was the First Amendment right of the lawyers and parties. In deciding whether the order abridged the rights of those challenging it, the court of appeals drew no distinction between the rights of the parties and lawyers to talk to third parties and the newspaper's right for them to be free to do so. 662 F.2d at 113-114.[5]

The First Circuit recognized that the press was making a serious request for the participants in the case to be free to discuss whatever the participants wanted to discuss and recognized that the press had First Amend-

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5. The First Circuit's recognition that a First Amendment interest was implicated in the order was explicitly approved by this Court in Seattle Times Co. v. Rhinehart, — U.S. —, 104 S. Ct. 2199, 2205 n. 12 (1984).

ment interest in such freedom. This approach contrasts sharply with the Texas court's characterization of the presses' request as a claim to a right "to root through . . . undigested documentary evidence." (App. 15.)

The Texas courts' decision is also in sharp conflict with the Sixth Circuit Court of Appeals decision in *CBS, Inc. v. Young,* 522 F.2d 234 (6th Cir. 1975). In *CBS* the district court had entered an order in a civil rights case arising from the deaths of Kent State University students during an antiwar demonstration. The order prevented participants in the litigation from "discussing in any manner whatsoever these cases with members of the news media or the public." 522 F.2d at 236. The Sixth Circuit held that CBS had a First Amendment interest that was violated by the court's order, that the news media had the same interest as the parties, witnesses and lawyers in those participants being free to discuss the case, and that the district court did not have authority to enter the order. This holding is in direct conflict with the decisions of the Texas courts below.

This Court should grant the petition to resolve this conflict. The question of the nature of the First Amendment rights of news gathering organizations as members of the public to have participants in important civil litigation free to discuss nonconfidential information discovered in the case is important and should be resolved by this Court.

III.

THE DECISIONS BELOW ARE IN CONFLICT WITH THIS COURT'S DECISION IN SEATTLE TIMES CO. v. RHINEHART.

In *Seattle Times Co. v. Rhinehart*, — U.S. —, 104 S. Ct. 2199 (1984), this Court held that a Washington state trial court had authority to prevent a newspaper that was a defendant in a libel case from publishing information obtained through discovery about the financial affairs of the plaintiffs in the case and information about the people who participated and contributed money to a private religious organization. This Court based its holding on the inherently private and personal nature of the information and upon the explicit showing of the need for such protection that had been made in the trial court. The movants had shown that the plaintiffs and the members of the religious group had been subject to assaults and anonymous threats. This Court concluded that the order advanced a legitimate governmental interest in having open courts and full discovery while protecting the privacy of litigants. Justice Powell concluded his opinion for the Court saying:

> We therefore hold that where, as in this case, a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment.

— U.S. —, 104 S. Ct. 2209-10.

The decision of the Texas courts in this case is a sharp departure from *Seattle Times*. There was no "showing of good cause." On October 11, 1983, Mr. Kronzer, a lawyer

for Halliburton, told the court that he had been contacted by reporters and the court responded by ordering that no one reveal any "evidence to the media." (App. 39.) The trial court apparently believed, and the court of appeals expressly held, that no explicit showing of good cause was required. The Texas courts have held that if the trial court believes in good faith that a secrecy order such as the one entered here would be helpful, it has the discretion to enter such an order. (App. 15, 34.) The effect of the Texas courts' ruling is to put the burden on those resisting the request for secrecy rather than those seeking it.

At the time the order at issue was entered, Texas Rule of Civil Procedure 186b required a showing of "good cause" before a protective order such as the one at issue here was entered. But the "good cause" requirement under the Texas rule was substantially less stringent than under Rule 26(c) (*see* Opinion of Texas Court of Appeals, App. 34).[6] Rule 26(c) of the federal rules requires the party seeking the order to show that disclosure of the information "will work a clearly defined and serious injury." *Zenith Radio Corp. v. Matsuhita Electric Industrial Co., Ltd.*, 529 F. Supp. 866, 891 (E.D. Pa. 1981). The showing

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6. The Texas Supreme Court amended the Texas Rules of Civil Procedure by an order of December 5, 1983, which was effective on April 1, 1984 which eliminated the phrase "good cause" from the Texas rules. Rule 166b4, Texas Rules of Civil Procedure, now authorizes protective orders "[o]n motion specifying the ground and made by any person against or from whom discovery is sought under these rules, the court may make any order in the interest of justice necessary to protect the movant from undue burden, unnecessary expense, harrassment or annoyance, or invasion of personal, constitutional or property rights."

must be made with a "particular and specific demonstration of fact as distinguished from a stereotyped and conclusory statement." *General Dynamics Corp v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 197), *cert. denied*, 414 U.S. 1162 (1974). The difference in the requirements of these two rules results in secrecy orders being the routine in complex cases instead of the unusual.

Brown & Root and Halliburton argued in the courts below that "blanket" confidentiality orders are in fact routine and that the routine entry of orders making all discovery secret is justified in complex cases because of the inconvenience of a practice of designating particular information or documents as confidential.[7] The practice that is often followed in complex federal litigation is, however, for the party claiming that information is confidential to designate the specific information for which protection is sought, and not for all information to be made secret as was done here. *See,* Board of Editors, Federal Judicial Center, *Manual for Complex Litigation,* pt. II § 2.50, reprinted as a supplement to C. Wright & A. Miller, *Federal Practice and Procedure* (1981). In the usual federal practice, the party claiming that specific information is confidential must show that it "will indeed be harmed by disclosure." *Johnson Foils, Inc. v. Huyck Corp.*, 61 F.R.D. 405, 409 (N.D.N.Y. 1973). *See generally Zenith Radio Corp.*

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7. Joint Answer and Brief of Authorities of Brown & Root, Inc. and The Halliburton Company, Real Parties in Interest, In Opposition to Relator's Motion for Leave to File Petition for Writ of Mandamus, In the Supreme Court of Texas, No. C-3253, Cox Enterprises, Inc. v. Hardy, No. C-3253 at 13-15; Joint Answer and Brief of Authorities of Brown & Root, Inc. and The Halliburton Company, In the Supreme Court of Texas, City of Austin, et al. v. Hardy, No. C-3366 at 27-29.

v. Matsuhita Electric Industrial Co., Ltd., supra, 529 F. Supp. at 889-92. The trial court here had, in fact, established a procedure to protect confidential documents before the order at issue was entered.[8]

The difference between the type of orders contemplated by the *Manual for Complex Litigation* and the order at issue here is that the effect of the order in this case is to have the litigation conducted in secret while the purpose, as well as the effect, of the procedure suggested by the *Manual* is to protect legitimate needs for confidentiality. Here, parties such as the City of Austin that do not want all the information it produces to be secret, are required to keep it secret. The order here, by including *all* information learned during discovery, has the effect of shutting off comment from the participants in the litigation to third parties. Because of the massive amount of information involved, a city councilman or the manager of the electric department cannot be certain of what he knows as a result of discovery and what he has learned from other sources. Since the potential result of a mistake is dismissal of the city's case, the participants' only choice is to maintain a veil of secrecy over the entire proceeding.[9]

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8. The protective order entered by the district court on September 22, 1983 allowed the parties to designate any document as "confidential" or "confidential-attorneys only" and provided that "a designation [of confidentiality] shall be binding on all parties until modified by agreement of the producing party or by further orders of this Court. At any subsequent hearing the burden of proof shall be on the producing party to show the protection is appropriate."

9. See Marcus, Myth and Reality in Protective Order Litigation, 69 Cornell L. Rev. 1, 58 (1983).

The question of whether this discovery process has or has not historically been public or whether it is or is not a part of a "trial" is not the critical issue. As Justice Stevens said in his concurring opinion in *Press-Enterprise Co. v. Superior Court,* "the distinction between trials and other official proceedings is not necessarily dispositive, or even important, in evaluating the First Amendment issue." — U.S. —, 104 S. Ct. 819, 828 (1984). The question is whether the access to the information in question "makes a positive contribution to this process of self governance." *Id.*

Complex civil litigation such as this case is often the forum for resolution by our government of some of the most important social issues of our time. The quality of the environment, the safety of products that are sold to consumers, the apportionment of legislative bodies, desegregation of local schools, the nature of the employment practices of local government, as well as many other issues have been turned over to the judicial process for resolution. *See* Chayes, *The Role of the Judge in Public Law Litigation,* 89 Harv. L. Rev. 1281 (1976). The discovery process is the most time consuming and expensive part of such litigation[10] and the information learned during discovery frequently leads to some judicially sanctioned set-

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10. The scope and nature of discovery in today's major case has made litigation in the United States more expensive than in any other part of the world. See Annual Message of Chief Justice Burger, Midyear Meeting of the Am. Bar Ass'n, February 12, 1984, reprinted 113 N.J.L.J. 281, 298 (Mar. 15, 1984). To allow discovery to take place in secret in cases directly involving the public interest will contribute to the problem of discovery abuse.

tlement that resolves the issue.[11] *See* Schiller & Wall, *Judicial Settlement Techniques,* 5 Am. J. Trial Advocacy 39 (1981). Indeed, one of the principal purposes of discovery is to promote such settlements. *See Krause v. Rhodes,* 671 F.2d 212, 214 (6th Cir.), *cert. denied,* — U.S. —, 103 S. Ct. 54 (1982). Knowledge about the nature of the information revealed during the discovery process is necessary for the public to understand the reasons for and the nature of these judicially sanctioned settlements.

The nonconfidential information learned during discovery would make a positive contribution to the public understanding of this complex legal struggle. Equally important, however, the information learned during discovery concerns in part how Austin city officials got the city into its present "fix." The STNP has repeatedly been a critical issue that has decided city council elections. In all probability, if the order at issue here had not been entered, nonconfidential information learned during discovery would be the focus of much of the campaign for the election to select Austin's next city council in April 1985.

IV.

THE DECISION BELOW THAT THIRD PARTIES HAVE NO RIGHTS PROTECTED BY THE FIRST AND FOURTEENTH AMENDMENTS TO ACCESS TO JUDICIAL RECORDS, INCLUDING DISCOVERY DOCUMENTS, IS FUNDAMENTALLY INCONSISTENT WITH THE DECISIONS OF THIS COURT AND IS IN CONFLICT WITH DECISIONS OF SEVERAL FEDERAL COURTS OF APPEAL.

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11. See e.g., Overton v. City of Austin, — F.2d — [5th Cir. Dec. 3, 1984]; Williams v. City of New Orleans, 729 F.2d 1554 (5th Cir. 1984); Massachusetts Ass'n for Retarded Citizens v. King, 643 F.2d 899 (1st Cir. 1981).

The trial court's order did not simply silence the participants in the South Texas Nuclear Project; it sealed from public inspection the court's public records. The trial court's order justified this action on the legal conclusion that the public, including the press, had no constitutional right of access to judicial records containing pretrial discovery. This is fundamentally inconsistent with the decisions of this Court and those of several federal courts of appeal.

This Court has recognized that normally judicial records are presumed to be open to the public:

> It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.

Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978). Although in that case this Court found no constitutional right of physical access to President Nixon's tapes for the purpose of copying and selling,[12] *Nixon* was de-

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12. Nixon did not hold that there was no constitutional right to access to the information in the court's files; that was not in issue because tapes were played in open court and transcripts were available. Indeed, this Court gave particular emphasis to the fact that it was not faced with the question of a truncated flow of information to the public:

> [The] press—including reporters of the electronic media —was permitted to listen to the tapes and report on what was heard. Reporters were also furnished transcripts of the tapes, which they were free to comment upon and publish. The contents of the tapes were given wide publicity by all elements of the media. There is no question of a truncated flow of information to the public.

435 U.S. at 609-10. The question before the Nixon court was actually one of the reasonableness of the time, place and manner restriction on the press. *The court was not faced with a total denial of public access to newsworthy information as is the case before this Court.*

cided before this Court's decisions in *Richmond, Globe,* or *Rhinehart,* which recognized First Amendment interests in access to information historically available to the public. Since *Nixon,* several federal courts of appeal have recognized that the public, including the press, has an interest, protected by the First Amendment, in access to judicial records. *Associated Press v. United States District Court,* 705 F.2d 1143 (9th Cir. 1983); *Publicker Industries v. Cohen,* 733 F.2d 1059 (3rd Cir. 1984); *United States v. Dorfman,* 690 F.2d 1230 (7th Cir. 1982); *In re Continental Illinois Securities Litigation,* 732 F.2d 1302 (7th Cir. 1984); *Brown & Williamson Tobacco Corp. v. F.T.C.,* 712 F.2d 1165 (6th Cir. 1983).

Unlike depositions, which are usually taken in a lawyer's office, and document inspections, which usually take place in private, many aspects of the discovery process usually take place in the public records. The Texas Rules of Civil Procedure provide that interrogatories and answers, requests for admissions and responses and requests for production and responses must be filed with the district clerk for inclusion in the court's files. *See* Rules 167-169, Texas Rules of Civil Procedure. Once filed, these matters are no longer the private property of the parties but become the public's property as part of the records maintained by its courts. As the above cited cases establish, these publicly owned documents are presumably open to public inspection.

This pesumption originates from the same source and serves the same purpose as access to judicial proceedings. As the Ninth Circuit noted in *Associated Press v. United States District Court:*

> There can be little dispute that the press and public have historically had a common law right of access to most pretrial documents, [citations omitted]—though not to some such as transcripts of grand jury proceedings. Moreover, pretrial documents . . . are often important to a full understanding of the way in which the judicial process and 'the government as a whole' are functioning.

705 F.2d at 1145. Just as this Court has recognized that the historic common law right of access to judicial proceedings serves First Amendment interests and deserves constitutional protection, so too does the historic common law right of access to judicial records deserve constitutional protection.

The First Amendment protects access to judicial proceedings to assure public knowledge about the workings of government. The judicial records involved here concern the same matters. The citizens of Austin have a direct and undeniable interest in evaluating the progress and probable outcome of the suit, and they also have an interest in evaluating the pre- and post-litigation performance of their government in this matter. The city officials have answered interrogatories and made admissions on their behalf, of which, as a result of the trial court's order, the citizens do not and cannot have knowledge. Facts have developed during discovery that may show mismanagement by city officials, that may reveal perfidy by the public contractor Brown and Root and its parent, and that may show the advantages or disadvantages of settling or discontinuing the case. The trial court's order bars the public from all of this vital information.

The First Amendment right of access placed upon the trial court a special responsibility to share the nonconfi-

dential information in its files with the public, the source of its power, in the absence of some showing of "good cause" as required in *Seattle Times v. Rhinehart* to deny the public access. The trial court's order ignored these interests, holding—in fundamental conflict with this Court and several federal courts of appeal—that it had no obligation to consider the public's right of access. The Court should grant the petition to resolve this conflict and to elaborate upon the right of access to nonconfidential discovery documents found in judicial records.

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CONCLUSION

The courts below concluded that requirements for open judicial proceedings do not apply to civil cases, a conclusion that is in conflict with the reasoning of this Court and the holdings of several federal courts of appeal. The courts below concluded that nonparties have no right protected by the First Amendment in having litigants free to discuss nonconfidential information learned during discovery in a civil case, a holding in conflict with decisions of the First and Sixth Circuit Courts of Appeal. The courts below have concluded that a trial judge who is motivated by a legitimate reason may drape all discovery, whether the information is confidential or not, in secrecy without a specific showing of any threatened harm, a conclusion in conflict with this Court's decision in *Seattle Times v. Rhinehart*. These decisions of the Texas courts authorize the conversion of the discovery process in complex, important litigation into a secret process as a routine

matter. Such a result will drastically limit the information necessary for the process of self-governance.

For these reasons, a writ of certiorari should be issued to review the order of the Supreme Court of Texas.

Respectfully submitted,

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APPENDIX A

NO. 81-H-0686-C

IN THE DISTRICT COURT OF
MATAGORDA COUNTY, TEXAS
130TH JUDICIAL DISTRICT

HOUSTON LIGHTING & POWER COMPANY, INDIVIDUALLY AND AS PROJECT MANAGER UNDER THE SOUTH TEXAS PROJECT PARTICIPATION AGREEMENT BETWEEN THE CITY OF SAN ANTONIO, TEXAS, CENTRAL POWER AND LIGHT COMPANY, HOUSTON LIGHTING & POWER COMPANY AND THE CITY OF AUSTIN, TEXAS, EXECUTED AS OF JULY 1, 1973, AS AMENDED, ET AL.

VS.

BROWN & ROOT, INC., ET AL.

PROTECTIVE ORDER

WHEREAS, this Court is required to preserve the rights of all parties in this cause to a fair trial by an impartial jury; and

WHEREAS, this Court has previously ordered that no deposition testimony be released to the media by any of the parties to this litigation; and

WHEREAS, the likelihood is great that potential jurors will be prejudiced by pretrial publicity, given the particular circumstances surrounding this cause, which this Court takes judicial notice, which include

1. The small size of Bay City, the town where the Court is located, and the proximity of the town to the South Texas Nuclear Project:

2. The unusually emotional nature of the issues involved;

3. The pretrial status of the suit;

4. The complexity of the suit, and the enormous number of documents involved, which, if selectively disclosed to third parties by the parties or their attorneys, could present materially false impressions as to the merits of the claims and their likelihood of success and interfere with the right to a fair trial to which all parties are entitled;

5. The fact that despite the Court's order of October 11, 1983 and the provisions of Tex. R. Civ. P. 210, third parties have sought to obtain access to the depositions taken in this cause; and

WHEREAS, all parties to this cause have a constitutional right to a fair trial, while third parties have no constitutional nor common law right of access to pretrial documents obtained through the discovery process in a civil case; and

WHEREAS, this Court is entitled to issue protective orders, in its sound discretion and in light of the relevant facts and circumstances of the particular case, under Tex. R. Civ. P. 186b; it is hereby

ORDERED, ADJUDGED and DECREED that prior to trial

1. All attorneys to this action shall strictly adhere to the letter and spirit of the provisions of the Texas Code of Professional Responsibility governing comments to the media in civil cases. Specifically, all attorneys shall refrain from making extrajudicial statements which constitute an "opinion as to the merits of the claims or defenses of a party," or which are "reasonably likely to interfere with a fair trial of the action." DR 7-107(G).

2. All parties, attorneys, experts employed by the parties, court reporters, clerks and officers of the Court shall refrain from disclosing to third parties information obtained though the Court's discovery processes.

3. All depositions, interrogatories and answers thereto, requests for admissions and answers thereto, and all other documents that may be offered in evidence in this cause shall be filed under seal and shall be opened only by order of the Court.

4. If the Court determines that any party's right to a fair trial has been jeopardized by a violation of this Order, it may take appropriate action, including but not limited to dismissing the claims for relief of any party found in violation of the Order, or ruling that any document released to the press shall be inadmissible at trial.

5. This Order shall not be interpreted to prohibit attorneys from communicating with the parties in order to prepare for trial, nor shall it be interpreted to prohibit the third parties from attending any live sessions before the Court or from publishing any information they have already obtained or may obtain in the future. The term "third parties" includes any person or organization not a party, not an attorney for a party, or not a person employed by the parties or attorneys for the parties for the purpose of assisting in this litigation.

6. This Order covers only those documents obtained through the discovery process, including deposition testimony, which may be offered in evidence in this cause, and does not cover pleadings, briefs and legal memoranda.

7. The Court shall entertain reasonable requests to modify this Order as the need arises.

SIGNED this 29th day of December, 1983.

/s/ G. P. Hardy
JUDGE PRESIDING

Filed at 10:55 O'clock A.M., December 29, 1983.
PAUL HATCHETT, CLERK of District Court, Matagorda Co., Texas.
By G. Marinir, Deputy.

APPENDIX B

COURT OF APPEALS
Thirteenth Supreme Judicial District
Corpus Christi, Texas

Below is the JUDGMENT in the numbered cause set out herein to be Filed and Entered in the Minutes of the Court of Appeals, Thirteenth Supreme Judicial District of Texas, at Corpus Christi, as of the *12th day of April, 1984.* If this Judgment does not conform to the opinion handed down by the Court in this cause, any party may file a Motion for Correction of Judgment with the Clerk of this Court.

CAUSE NO. 13-83-544-CV
CAUSE NO. 13-84-015-CV
CAUSE NO. 13-84-016-CV

HOUSTON CHRONICLE PUBLISHING COMPANY & COX ENTERPRISES, INC. D/B/A AUSTIN AMERICAN-STATESMAN,

Relators

and

CITY OF AUSTIN

Relator

and

CITY OF SAN ANTONIO, TEXAS, ACTING BY AND THROUGH THE CITY PUBLIC SERVICE BOARD OF THE CITY OF SAN ANTONIO, TEXAS,

Relator

v.

THE HONORABLE G. P. HARDY, JR., DISTRICT JUDGE, 130TH DISTRICT COURT, MATAGORDA COUNTY, TEXAS, SERVING BY SPECIAL APPOINTMENT,

Respondent.

On Petitions for Writs of Mandamus

* * * * * * * * *

JUDGMENT

On Petitions for Writs of Mandamus. Opinion by Justice Quentin Keith.

THIS CAUSE was submitted to the Court on February 2, 1984, on oral argument, petitions and briefs. These having been examined and fully considered, it is the opinion of the Court that no error was committed by the trial judge in the entry of the protective order. Accordingly, all relief sought by the moving parties is denied, and each application for relief is refused.

Rudy Gonzales, Jr., Clerk

NUMBER 13-83-544-CV

COURT OF APPEALS

THIRTEENTH SUPREME JUDICIAL

DISTRICT OF TEXAS

CORPUS CHRISTI

* * * * * * * *

HOUSTON CHRONICLE PUBLISHING COMPANY & COX ENTERPRISES, INC. D/B/A AUSTIN AMERICAN-STATESMAN,

Relators,

v.

THE HONORABLE G. P. HARDY, JR., DISTRICT JUDGE, 130TH DISTRICT COURT, MATAGORDA COUNTY, TEXAS, SERVING BY SPECIAL APPOINTMENT,

Respondent,

* * * * * * * *

NUMBER 13-84-015-CV

CITY OF AUSTIN,

Relator,

v.

THE HONORABLE G. P. HARDY, JR.,
DISTRICT JUDGE, 130TH DISTRICT COURT,
MATAGORDA COUNTY, TEXAS,
SERVING BY SPECIAL APPOINTMENT,

Respondent,

* * * * * * *

NUMBER 13-84-016-CV

CITY OF SAN ANTONIO, TEXAS,
ACTING BY AND THROUGH THE
CITY PUBLIC SERVICE BOARD OF THE
CITY OF SAN ANTONIO, TEXAS,

Relator,

v.

THE HONORABLE G. P. HARDY, JR.,
DISTRICT JUDGE, 130TH JUDICIAL COURT,
MATAGORDA COUNTY, TEXAS,
SERVING BY SPECIAL APPOINTMENT,

Respondent.

* * * * * * *

On Petitions for Writs of Mandamus

* * * * * * *

Before Paul W. Nye, C.J.; Norman L. Utter, J;
and Quentin Keith, J.[1]

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1 Associate Justice, Court of Appeals, Ninth Supreme Judicial District (Ret.), sitting by designation. See, *Art. 1812*, as amended.

* * * * * * *

OPINION

Our original jurisdiction has been invoked in three separate proceedings wherein each relator seeks the writ of mandamus to compel the Honorable G. P. Hardy, Jr., the District Judge of the 130th District Court of Matagorda County, serving by special appointment, to permit public dissemination of pretrial discovery material in depositions taken by the parties in a suit now pending, untried, in said court.

THE BACKGROUND

The underlying suit now pending before Judge Hardy is No. 81-H-0686-C, entitled Houston Lighting & Power Co., individually and as Project Manager under the South Texas Project Agreement between the City of San Antonio, Texas, Central Power & Light Co., Houston Lighting & Power Co., and the City of Austin, Texas, executed as of July 1, 1973, as amended, et al vs. Brown & Root, Inc., and The Halliburton Company. pending in the 130th District Court of Matagorda County, Texas.

Our *moving parties* are: (1) The Houston Chronicle, a newspaper published in Houston, Texas, with a wide circulation throughout South Texas; (2) Cox Broadcasting Co., Inc., publisher of the Austin, American-Statesman, newspapers with wide circulation in and near the City of Austin, Texas; (3) City of San Antonio, Texas, one of the participants in the construction contract with Brown & Root, Inc. Involved in their litigation; and (4) City of Austin, Texas, also a participant in the construction contract with Brown & Root, Inc. and involved in their litigation.

The *real parties in interest* in this action are: (1) Brown & Root, Inc. (hereinafter B&R), a defendant in the litigation; (2) The Halliburton Company, also a defendant in the litigation, the owner of all of the corporate stock of B&R; and (3) Houston Lighting & Power Co. (hereinafter HL&P), plaintiff in the litigation.

The underlying litigation. The suit now in the pretrial stages in the District Court of Matagorda County, where it is generally known as the "South Texas Nuclear Project Litigation" which is a suit brought by the plaintiff HL&P against B&R and Halliburton for the allged breach of defendants' obligations as architect, engineer, construction manager and constructor of the nuclear generation station known as the South Texas Nuclear Project. The plaintiffs in amended pleadings make serious and substantial allegations of breaches of defendants' obligations to provide engineering expertise and quality assurance in the engineering and construction of the project; misrepresentations of engineering experience devoted to the project; mismanagement of design, engineering and construction; failure to complete the project in a timely fashion, resulting in cost overruns and abandonment of the project. Plaintiff's allegations and the defendants' responses raise serious and substantial implications, not only for the financial well-being of the parties to the litigation, but also because they involve issues of major public importance and significance for the economic welfare of the readers of the newspapers who are also electric rate payers of HL&P and of the two cities named above.

We are advised by counsel for B&R that Judge Hardy, now retired, had presided over the same trial court for some 35 years and is now sitting by special assignment.

Counsel states that the suit was originally filed on December 16, 1981, and has already resulted

> "in a record of 1,419 pages of pretrial hearings and some 498 pleadings and briefs comprising thousands of pages. Some 19,700 pages of deposition transcripts have been received, and the parties collectively have stated that they need to take, at least, another 250 depositions. Defendants have produced some 23.6 million pages of documents and plaintiffs have produced some 3 million pages. To visualize the magnitude of the production, if copies of the documents were stacked, the pile would be 1-⅔ miles high. Substantial document production remains to be completed."

[Reasoner Brief, filed 1/27/84.]

THE ORDER SUMMARIZED

We attach hereto as an appendix, a copy of the order now attacked in these proceedings and now summarize the order which:

(1) Requires the attorneys for the parties to honor the provisions of the Texas Code of Professional Responsibility governing comments to the media in civil cases;

(2) Requires the parties, their attorneys and assistants to refrain from disclosing to third parties information obtained through the Court's discovery processes; and

(3) Seals the depositions, interrogatory answers and other documents that are obtained in discovery and may be offered in evidence.

The order also provides that:

(4) There shall be no limitation on access to hearings and evidence offered therein;

(5) There shall be no limitation on the media's right to publish information it has obtained or may obtain from other sources;

(6) There is no limitation on the attorneys' right to communicate with their clients; and

(7) The Court offers to entertain reasonable requests to modify the order in the future.

The Court finds that the town where the court sits is in close proximity to the nuclear project and that the issues are unusually emotional.

The Order recites that the complexity of the suit and the enormous number of documents involved, which, if selectively disclosed to third parties by the parties or their attorneys, could present materially false impressions as to the merits of the claims and their likelihood of success and interfere with the right to a fair trial to which all parties aspire. Upon the basis of such recitations as shown by the order itself, the trial court ordered the attorneys to refrain from making any comments to the media in this cause and, specifically, that all attorneys shall refrain from making extrajudicial statements which constitute "opinion as to the merits of the claim or defenses of a party" or which are "reasonably likely to interfere with the fair trial of the action."

All parties, attorneys, experts, etc. employed by the parties, court reporters, clerks and officers of the court shall likewise refrain from disclosing to third parties information obtained through the court's discovery processes.

All depositions, interrogatories and answers thereto-requests for admisisons and answers thereto and all other

documents shall be filed under seal and shall be opened only by order of the court.

Paragraph 4 of the Order reads:

> "If the Court determines that any party's right to a fair trial has been jeopardized by a violation of this Order, it may take appropriate action, including but not limited to dismissing the claim for relief of any party found in violation of the Order, or ruling that any document released to the press shall be inadmissible at the trial."

Finally, the court ordered that reasonable requests to modify the closure order would be considered as the need arises in the future.

The 1983 amendment to TEX.REV.CIV.STAT., Art. 1824, expanded our original jurisdiction in mandamus actions. It specifically provides that such writs shall issue "agreeable to the principles of law regulating such writs."[2] One of the fundamental rules governing mandamus proceedings is that the Court will not review the exercise of discretionary authority by the judge of a court or other officer. Terrell v. Green, 88 Tex. 539, 31 S.W. 631, 634 (1895). However, "the writ may issue in a proper case to correct a clear abuse of discretion." Crane v. Tunks, 169 Tex. 182, 328 S.W.2d 434, 440 (1959).

Movants have indeed chosen the hard road in seeking the writ of mandamus in this case. As noted by the Court in Fisher v. Continental Illinois Bank & Trust Co., 424 S.W.2d 664, 670 (Tex.Civ.App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.):

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[2] Vernon's Texas Session Law Service, 1983, p. 4769.

> "By the very nature of things, [motions for the protection of parties and witnesses . . .] must be addressed to the sound discretion of the trial court."

See also the comments in Meyer v. Tunks, 360 S.W.2d 518 (Tex. 1962).

THE NEWSPAPERS' CONTENTIONS

The Houston Chronicle argues, mistakenly, that Judge Hardy's order denied *access* to the proceedings in violation of its First Amendment rights. It continues its argument, this time correctly, that "a number of state courts have considered the question of whether the right of the public and press to attend *criminal* trial proceedings applies to pretrial proceedings (emphasis supplied) . . ." But, counsel cites not a single case, state or federal, which holds directly that raw pretrial depositions, taken in a civil case, which have never been offered in evidence upon a future trial is subject to access, as a matter of right, to the news media. Upon oral submission, all counsel agreed that they knew of no such case; and, considering the caliber of counsel, the reputation statewide which they enjoy, and our independent research, we must accept such statement as a fact. Chief Justice Burger, concurring in Gannett Co. v. DePasquale, 443 U.S. 368, 396-397 (1979), articulated his disagreement with such a contention in this language:

> "[D]uring the last 40 years in which the pretrial processes have been enormously expanded, it has never occurred to anyone, so far as I am aware, that a pretrial deposition or pretrial interrogatories were other than *wholly private to the litigants.* A pretrial deposition does not become a part of a 'trial' until and unless the contents of the deposition are offered in evidence . . .

> For me, the essence of all of this is that by definition 'pretrial proceedings' are exactly that." (Emphasis supplied.)

Justice Stewart, speaking for the majority in *Gannett Co. v. DePasquale,* supra, noted that the press had no privilege for the reporting of pretrial proceedings under English Common Law. He noted that in the cited case that: "the court forbade the dissemination of information about a pretrial hearing to protect the right of the accused to receive a fair trial." This was one of the assigned reasons for the entry of Judge Hardy's order now under attack.

And, it should never be forgotten that *DePasquale* was a criminal case, and the order simply prohibited publication of information which came out in a pretrial suppression hearing during a murder trial.

In Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978), the press sought access to Ex-President Nixon's tapes which had been offered in evidence at trial. The movant sought access so that it could copy and broadcast the tapes. The Court held that the press had no First Amendment right of access to the tapes, using this significant language:

> "The First Amendment generally grants the press no right to information about a trial superior to that of the general public. 'Once beyond the confines of the courthouse, a newsgathering agency may publicize, within limits, what its representatives have heard and seen in the courtroom. But the line is drawn at the courthouse door; and within, a reporter's constitutional rights are no greater than those of any other member of the general public."

Counsel for the newspapers have cited many authoritative cases holding generally that the press has a right of access to trials. That question is not before us. The order entered by Judge Hardy does not close the courthouse or any part of the actual trial of the cause. Media representatives have only been denied *their claimed* right to root through a tremendous pile of undigested documentary evidence assembled during pretrial discovery proceedings by Judge Hardy's order. This restriction has only been done, after a hearing and then for perfectly legitimate reasons, one of which is paramount, and that is to afford the litigants a fair trial of the trial issues presented in the case.

The newspapers have cited an imposing list of criminal cases which have denied access to the trial itself. Such citations are not helpful nor germane to the decision of the case at bar. For instance, it is asserted that "the constitutional right of access afforded the public and press under the First Amendment established by the Supreme Court in *Richmond* and *Globe*[3] clearly applies to pretrial proceedings as well as trials." United States v. Chagra, 701 F.2d 354 (5th Cir. 1983). *Chagra* was indicted for several offenses, including conspiracy to murder Federal Judge John Wood. The U.S. Magistrate closed the proceedings in a bond reduction hearing so as to prevent publication of a statement which Chagra asserted was an inadmissible part of a plea bargain and would likely prevent his being afforded a fair trial. We hold that *Chagra*

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[3] Richmond Newspapers v. Commonwealth of Virgina, 448 U.S. 555 (1980), and Globe Newspaper Company v. Superior Court, 457 U.S. 596 (1982), respectively.

bears no factual similarity to the case at bar and does not support movants' claims for relief.

Two decisions by the Texas Court of Criminal Appeals cited to us suffer the same infirmity and lack of precedential value:

(1) Houston Chronicle Publishing Co. v. McMaster, 598 S.W.2d 864 (Tex.Crim.App. 1980). The action was precipitated when the respondent judge closed to the public a hearing he was then conducting in post conviction habeas corpus proceedings. There, the convicted murderer was contending that he had received ineffective assistance of counsel during his trial because his lawyer was having an affair with the defendant's wife during the trial. The hearing was in a criminal matter which had already been tried, and the holding was predicated upon Article 1.24, V.A.C.C.P., which requires all proceedings and trials of criminal cases to be public. The result is not persuasive when compared to the case at bar.

(2) The case of Houston Chronicle Publishing Co. v. Shaver, 630 S.W.2d 927 (Tex.Crim.App. 1982) arose when the trial court was conducting a *Jackson v. Denno*[4] suppression hearing and closed the hearing to the public and news repoters. This, too, arose out of a criminal proceeding and is not helpful in our analysis of the claim for relief.

Similarly, citation of Associated Press v. United States, 705 F.2d 1143 (9th Cir. 1983) also falls far short of the mark. That was a case arising out of the well-known

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[4] Jackson v. Denno, 378 U.S. 368 (1964).

DeLorean criminal prosecution and involved criminal pretrial proceedings—not pretrial civil proceedings.

Judge Hardy did not rely upon his inherent powers. He had the judicial power and authority that was explicitly granted by TEX.R.CIV.P., Rule 186b. This rule bears a marked resemblance to FED.R.CIV.P., Rule 26(c) which is mentioned frequently in the federal decisions on the subject. A similar state court rule in Washington State was considered by the Washington Supreme Court in Seattle Times Co. v. Rhinehart, 98 Wn.2d 226, 654 P.2d 673 (Wash. Sup.Ct. 1982, cert. Gr., 104 S.Ct. 64, 1983).[5]

We find no merit to the contentions advanced by the newspapers that Judge Hardy's protective order constituted an impermissible prior restraint upon any rights of the moving parties. Accordingly, all relief sought upon such theory is here denied.

Before turning to the contentions of the cities, we note that on at least one occasion, the Texas Supreme Court declined to consider a similar question. It was presented by Cox Enterprises, Inc., d/b/a the Lufkin News. An interesting account of this case is to be found in Murray v. Leach, 535 F.Supp. 765, 768-769 (D.C. E.D. Tex. 1981).

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[5] The holding in *Rhinehart* is summarized in 51 L.W. 2348 (12/14/82), and the Court came to the conclusion that a protective order prohibiting the newspaper defendant in a libel action from publishing any information obtained through discovery was not unconstitutional prior restraint. Rhinehart was scheduled for submission in the United States Supreme Court for the week of February 21, 1984, while this cause is under consideration by this court. See 52 L.W. 3579, 2/14/84.

We have given careful consideration to all of the contentions advanced by the newspapers, although we may not have written specifically on each argument advanced. However, we find no merit in any of the contentions. As such, each is therefore overruled. The relief sought by each of the newspapers is denied, and Judge Hardy's order will remain undisturbed.

THE ARGUMENT OF THE CITY OF AUSTIN AND THE CITY OF SAN ANTONIO

At the outset of our discussion of the contentions of the two cities, we note that each city is involved in the litigation in its proprietary capacity as the operator of its electric generation and distribution system. *See* City of Greenville v. Pitts, 102 Tex. 1, 107 S.W. 50, 51 (1908). On the other hand, many discretionary functions exercised by cities are governmental in nature. See e.g., police power, Tyler v. Ingraham, 139 Tex. 600, 164 S.W.2d 516, 519 (1942).

It should be remembered, at the outset, that each city voluntarily joined in this litigation seeking affirmative relief. Municipalites are mere creatures and subdivisions of the State, Security Trust Co. v. Lipscomb County, 142 Tex. 572, 180 S.W.2d 151, 159 (1944). Consequently, the cities are bound by the same rules that govern the State when it appears as a party in a judicial proceeding; it occupies the same position as any other litigant. This is language which was used in the old case of State v. Cloudt, 84 S.W. 415, 416 (Tex.Civ.App.—San Antonio 1904, writ ref'd):

> "When a state appears as a party to a suit, she voluntarily casts off the robes of her sovereignty, and

> stands before the bar of a court of her own creation in the same attitude as an individual litigant; and *her rights are determined and fixed by the same principles of law and equity,* and a judgment for or against her must be given the same effect as would have been given it had it been rendered in a case between private individuals." [Emphasis added.]

This language was quoted by the Supreme Court in Wortham v. Walker, 133 Tex. 255, 128 S.W.2d 1138, 1145-6 (1949). *See also* Anderson, Clayton & Co. v. State, 122 Tex. 530, 62 S.W.2d 107, 110 (Tex.Com.App. 1933, opinion adopted).

Relator Austin initially sets forth the following four reasons in support of their contention that the protective order issued by Respondent is inappropriate and should be set aside:

> (1) Defendants (Brown & Root, Inc., and the Halliburton Co.) have waived the right to seek such a protective order (i.e., defendants have brought publicity to the suit through media, and cannot now claim their rights to a fair trial will be infringed without a protective order):
>
> (2) the order interferes with the ability and right of Austin to prepare for trial;
>
> (3) the order interferes with Austin's constitutional and common-law rights respecting its right to know of and comment on the lawsuit since it prevents city officials from communicating with the citizenry; and
>
> (4) the order is inconsistent with other acts and proceedings which require disclosure of the materials subject to the protective order (i.e., the order interferes with Austin's officials' lawful exercise of governmental functions).

Austin's foremost argument in opposition to the protective order is that the First Amendment rights to free

speech of its public officials have been impermissibly interfered with, such that the order operates as a "prior restraint." Austin contends the order effectively bars "parties," such as Austin, from communicating with "third parties," such as the residents of Austin, about *any* discovery material connected with the instant lawsuit. Austin further contends that the "chilling effect" of the order on the First Amendment rights of its public officials will deprive its citizenry of information necessary to make informed decisions with respect to future funding for the project, the ultimate disposition of the case, and the independent judgment of the citizenry as to the reasons for and the persons/events responsible for the city's present situation.

Relator San Antonio asserts similar contentions to those of Relator Austin and expressly adopts Austin's arguments as to the defendant's waiver of any right to seek a protective order. Most notably, San Antonio asserts that the order operates as an unlawful "prior restraint" upon the parties' constitutionally protected rights to freely discuss information they lawfully possess through discovery in the South Texas Project litigation. Secondly, San Antonio opposed defendants' Motion for Protective Order prior to and subsequent to the issuance of the order for the reason that defendants did not establish "good cause" to warrant granting their motion in order to protect defendants' right to a fair trial. Finally, San Antonio attacks that portion of the order in which the Court took judicial notice of certain matters for the reasons that the matters judicially noted in the order were not proper subjects for judicial notice under Tex.R.Evid. 201; and defendants did not provide sufficient, if any, evidence to support these conclusions.

Defendants, Brown & Root, Inc., and the Halliburton Company, initially submit that relators' attacks on the order are premature. Defendants contend that until Austin and San Antonio have a genuine need to release a specific document subject to the order and Judge Hardy declines to release it, relators have not been harmed. In response to the various arguments of relators, defendants answer briefly the following:

(1) There is no inhibition under the Texas or United States Constitutions or Texas law to subjecting municipal corporations to the protective order entered here (i.e., as litigants in proceedings such as these cities are municipal corporations with no special rights);

(2) Judge Hardy's order was not an abuse of discretion but was entered with good cause based on proper findings;

(3) Relators' claims that Brown & Root and Halliburton have been improperly attempting to frustrate discovery and conceal facts are both patently irrelevant to the issues before this Court and are patently false.

Notwithstanding relators' waiver argument, Relator Austin contends that the present proceeding primarily revolves around a narrow constitutional question: a party's sixth amendment right to a fair trial (i.e., the right to select an impartial jury) versus a party's right to free speech (i.e., free of prior restraints) as protected by the First and Fourteenth Amendments to the U.S. Constitution and Article I, section 8 of the Texas Constitution. More specifically, the underlying issue proposed to this Court turns on a party's First Amendment interest in disseminating information obtained through discovery.

Austin and San Antonio rely extensively on the majority opinion of In Re Halkin, 598 F.2d 176 (D.C. Cir. 1979)

in support of their contention that the First Amendment rights of their respective public officials, as representatives of the people of Austin and San Antonio, attach to materials made available through discovery. Relators further adopt the position of the *Halkin* Court that, since the First Amendment rights of a party to civil litigation extend to information obtained through discovery, any "prior restraint" on the speech of a party entered under the guise of a protective order restricting dissemination of discovery material must meet *stringent* First Amendment criteria. *Id.* at 190-91.

In *Halkin,* the prinicpal defendant was the United States government, sued by a number of individuals for invasion of their Constitutional rights through unlawful surveillance, occasioned by their opposition to the Viet Nam war. There was no queston but that the matters threatened to be released were of public importance, as well as public interest. The District Court signed defendant's proposed order, pursuant to Fed.R.Civ.P. 26(c), restraining the parties and their counsel from publicly disclosing information obtained through discovery. *Id.* at 182. Plaintiffs petitioned the D.C. District Court of Appeals for a writ of mandamus to vacate the District Court's order on the basis that the order constituted an invalid "prior restraint" of expression and the order lacked the "good cause" required by Fed.R.Civ.P 26(c). *Id.* The majority, following a lengthy analysis of the "First Amendment and the Discovery Process," concluded the following:

> "Judged by the standards imposed by Rule 26(c) and the First Amendment, the district court's order is indisputably deficient. *It prohibits political expression, yet it is silent as to its reasons, rests on no express*

> *findings, and is unsupported by any evidence.* *Id.* at 197.

The *Halkin* Court further determined that mandamus was appropriate in that case, particularly because plaintiffs had "no other available adequate remedy." *Id.* at 198-99. The *Halkin* Court did not issue the writ at that time, but transmitted a copy of the opinion to the District Court to "permit further proceedings in light of the discussion herein." *Id.* at 200.

The *Halkin* Court noted that a judicial order pursuant to Rule 26(c) limiting lawyers' and parties' expression does possess many of the characteristics of an administrative licensing scheme; the traditional "prior restraint." *Id.* at 183. The Court went on to distinguish an order properly issued under Rule 26(c) from an administrative censorship scheme in stating that "such an order need not present the same dangers as many delegations of authority to an administrative censor, nor the same threat to expression generated by other judicial orders previously condemned as prior restraints." *Id.* at 184-85 (footnote nos. 16, 17).

Contrary to relator's assertion, the *Halkin* court was careful to point out that it did not categorize the protective order involved in that case as a "prior restraint":

> [W]e do not believe, however, that the proper resolution of this case in the end turns on whether this order can be termed a prior restraint. We observe the admonition of Justice Frankfurter that the term "prior restraint" should not be used as "a talismanic test," Kingsley Books, Inc. v. Brown, 354 U.S. 436, 441 77 S.Ct. 1325 (1957), and do not begin our examination with an almost insurmountable pesumption against the validity of this order. *However, the fact that the*

order poses many of the dangers of a prior restraint is sufficient to require close scrutiny of its impact on protected First Amendment expression. *Id.* at 186.

In discussing the First Amendment interests of litigants and lawyers, the *Halkin* court recognized that litigation itself is a form of expression protected by the First Amendment. The Court favored the language of a recent Supreme Court case which stressed that litigation may be "a vehicle for effective political expression and association, as well as a means of communicating useful information to the public." *Id.* at 187 (citing In re Primus, 436 U.S. 412, 431 [1978]). The majority reasoned that because the courts have concluded that lawyers and parties retain their First Amendment rights even as participants in the judicial process, those rights extend to discovery materials. *Id.*

Next, the Court examined the extent of the First Amendment interest in discovery materials. Generally speaking, when a party obtains documents or information through the discovery process, he can "use that information in any way which the law permits." Leonia Amusement Corp. v. Loew's, Inc., 18 F.R.D. 503, 508 (S.D.W.Y. 1955); *accord* Essex Wire Corp. v. Eastern Electric Sales Co., 48 F.R.D. 308, 312 (E.D.Pa. 1969). Under Rule 26(c), Fed.R.Civ.P., the party or person from whom discovery is sought must establish "good cause" for any restriction on the use of discovery documents. The *Halkin* Court held that, under the federal rules, the implication is clear that without a protective order, materials obtained in discovery may be used by a party for any purpose, including dissemination to the public. 598 F.2d at 188.

The *Halkin* Court concluded that a restriction on what parties may say about information *once they have obtained it* directly implicates the First Amendment. *Id.* at 190. The conclusion that First Amendment rights attach to materials made available through the discovery process did not, however, end their inquiry. The court acknowledged that the First Amendment is not an absolute, *see* Near v. Minnesota, 283 U.S. 697, 716 (1931), and the protection afforded the exercise of First Amendment rights may be limited in certain narrow circumstances. *Id.* Protection of a subordinating public interest may justify *narrowly drawn* restrictions of First Amendment rights. The majority determined that the appropriate constitutional standard governing the issuance of restraining orders under Rule 26(c) must take account of the important public interests in the functioning of the discovery process, and the unique characteristics of that process, as well as the First Amendment interest in unfettered expression. *Id.* at 191. The Court then proceeded to an examination of the constitutional standard which the trial judge "must" apply before entering a protective order under Rule 26(c), which will be discussed hereinafter.

A second case recognizing the potential conflict between First Amendment interests and judicial protective orders under Rule 26(c) is In Re San Juan Star, 662 F.2d 108 (1st Cir. 1981). The *San Juan Star* case involved a federal civil rights action brought by relatives of two suspected terrorists that were killed in a shootout with police officers in Puerto Rico. The relatives alleged in their suit that police officers, senior law enforcement officials and the government of Puerto Rico had conspired to arrange the killings. That suit, which also called into ques-

tion the valdity of two earlier Justice Department reports exonerating the defendants, stirred enormous interest and publicity in Puerto Rico. Media coverage of the developing litigation had been intense, with defendants' deposition testimony reported, together with explanations provided by both sides, virtually at the time it was given.

In response to the publicity, the district court issued several orders. The second order prohibited attorneys from disclosing all evidence obtained through *subsequent depositions to the press, to the litigants themselves, or to any third party.* 662 F.2d at 111. Emphasizing that all information would become public once trial began, the court described its order as a protective order governing the taking of depositions under Fed.R.Civ.P. 26(c), with the requisite "good cause" found in a "reasonable likelihood" that the wide dissemination of prejudicial publicity would otherwise deny the defendants a fair trial. *Id.* It is important to note that the parties objecting to a protective order in *San Juan Star* were not litigants, but rather were members of the media who desired to obtain information from attorneys subject to such an order.

On review, the First Circuit held that significant but limited First Amendment concerns are implicated by a protective order restricting the dissemination of information obtained through court-ordered depositions. *Id.* at 114. The *San Juan Star* Court began their inquiry with the undisputed fact that a court under Rule 26(c) (1) can deny access to information altogether by preventing discovery upon a showing of any "good cause." *Id.* The Court proceeded to explain that it did not consider "undigested matter, forced from the mouth of an unwilling deponent" to be encompassed within a broad public "right to know."

Id. at 115. The Court further stated that the prior restraint standard of Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976), a case principally relied on by relator San Antonio, did not apply:

> "Our next step is to recognize the relevant but not determinative fact that litigants, their attorneys, and the press would have a strong interest in being able to convey and receive truthful reports of *public* criminal and civil judicial proceedings, see Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 595-96, 100 S.Ct. 2814, 2838-39, 65 L.Ed.2d 973 (1980) (Brennan, J., concurring in the judgment), and that restraints on the transfer of newsworthy information of this nature would be subject to the highest degree of protection. See Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559, 96 S.Ct. 2791, 2802, 49 L.Ed.2d 683 (1976). *When information is produced during civil discovery, however, the First Amendment interests and consequently the degree of severity of our scrutiny of the restraints are different.*" 662 F.2d at 114 (emphasis supplied).

The *San Juan Star* Court (1st Cir. 1981) continued with the following language, to which defendants Brown & Root, Inc., and Halliburton Co. cite repeatedly:

> "Such undigested matter, forced from the mouth of an unwilling deponent, is hardly material encompassed within a broad public "right to know." Its disclosure would not advance the informed civic and political discussion that the First Amendment is intended to protect. We do not see present in the case of civil discovery those interests that make publicity in a criminal trial an important 'safeguard against any attempt to employ our courts as instruments of persecution,' In re Oliver, 333 U.S. 257, 279, 68 S.Ct. 499, 510, 92 L.Ed. 682 (1948). *Nor can the discovery processes lay claim to the long tradition of openness enjoyed by criminal or civil trials.* Compare Rich-

> mond Newspapers, Inc. v. Virginia, supra, 448 U.S. at 564-69, 100 S.Ct. at 2821-23 (opinion of Burger, C.J.). 622 F.2d at 115 (emphasis supplied).

The 1st Cir. Court concluded that, although there is a First Amendment interest in information produced at trial that warrants full protection, a judicially-powered process compelling information that has not yet passed through the adversary-judicial filter for testing admissibility does not create communications that deserve full protection.

The communications produced during discovery are not totally undeserving of protection under the First Amendment. Accordingly, the *San Juan Star* Court decided to scrutinize the restraints imposed by protective orders under a less severe standard than that ordinarily applied to prior restraints. The Court characterized its standard as one "of 'good cause' that incorporates a 'heightened sensitivity' to the First Amendment concerns at stake," a position midway between those taken in the majority and dissenting opinions in *Halkin*. *Id.* at 116.

We now turn to the plaintiffs' appeal of that part of the same order that prohibited disclosure of deposition material by plaintiffs' counsel to their clients, i.e., plaintiffs themselves. The Court found it to be clearly invalid and reversed that portion of the district court's order. *Id.* at 118. The order issued by respondent in the South Texas Project litigation is not the same as that issued in the *San Juan Star* case. Admittedly, by all parties the present order does not prohibit any attorney from communicating with his clients or prospective witnesses concerning discovery materials. Rather, the order is intended to thereafter "seal the lips" of those prospective wit-

nesses and parties to prevent them from discussing such material with third parties outside the case.

Respondent Judge Hardy, as well as the defendants herein, refer this Court to the recent D.C. Circuit case of Tavoulareas v. The Washington Post Co., 724 F.2d 1010 (D.C. Cir. 1984), in support of the subject protective order entered by Judge Hardy. In that case, Mobil Oil Corp., the intervening party moving for a protective order to secure the *confidentiality of commercial information* sought by the Post, was seeking reversal of the portion of a district court order that unsealed 3800 pages of deposition transcripts and 425 exhibits. These documents were initially designated confidential by Mobil pursuant to a "blanket" protective order. Mobil contested only the disclosure of those documents *"not used at trial"*; i.e., those never submitted into evidence, read into the record, or submitted in support of a pretrial motion.

The *Tavoulareas* Court said:

> After full consideration, we disagree with the district court's conclusion that Mobil's showing was insufficient *to justify continued confidentiality* of those depositions never used at trial. Our decision follows from a different view of the relevant statutory and constitutional interests from that of the district court. While we acknowledge that discovery is presumptively open under the Federal Rules of Civil Procedure, we believe that statutory, common law, and constitutional privacy interests require protecting the confidentiality of Mobil's sensitive commercial information. *Public dissemination of confidential discovery materials not used at trial cannot be justified by a common law or constitutional right of access or by a first amendment right of free speech or free press.* (Emphasis supplied.)

In this respect, Respondent contends that the constitutional right of access only applies to materials upon which a judicial decision is based, unlike the pretrial depositions filed pursuant to the South Texas Project litigation. Relator Austin replied to this contention during oral argument by stating that they are not arguing a constitutional or comman law right of access to discovery materials because, as a party, "we already have access to that information."

In *Tavoulareas,* following a lengthy discussion of the privacy interests that will overcome the Federal rules' "presumption of openness," the Court proceeded with a First Amendment free expression analysis. The *Tavoulareas* Court appeared to reject the majority's opinion in *In re Halkin,* 598 F.2d 176 (D.C. Cir. 1979), in that they denied that the source of information can affect the free expression interest of the speaker:

> In the discovery context, the government is in a very real sense the direct source of discovered materials since those materials are made available only through the compulsory processes of the court. *A litigant's interest in disseminating information obtained through the court's processes consequently is not unfettered. Rather, the litigant's qualified expression interest must be balanced against the court's interest in preserving the confidentiality of private information it has supplied that litigant.*

The Court acknowledged that a court has an interest in preserving the integrity of the discovery process by encouraging full investigation of the disputed facts and issues, and that such investigation will occur effectively only if the court can assure the parties that disclosed confiden-

ital materials will be used only for the purpose of litigation.

The *Tavoulareas* Court concluded that the Post's free expression interest, even as a litigant, must bow to the court's obligation to avoid a severe intrusion on Mobil's constitutionally protected privacy interest and to preserve the integrity of the discovery process. Absent a compelling interest supporting disclosure, the district court was ordered to reinstate the seal on the 3800 pages of deposition transcript never used at trial.

Relator Austin cites this Court to Bernard v. Gulf Oil Company, 619 F.2d 459 (5th Cir. 1980), aff'd, 452 U.S. 89 (1981), which was an employment discrimination suit brought as a class action by six present or retired black employees of the Port Arthur, Texas, plant of Gulf Oil Co., under Title VII of the Civil Rights Act of 1964. Plaintiffs alleged that Gulf, the employer, and the unions had discriminated against them and other similarly situated blacks in hiring, job assignments, pay scales, discipline and discharge, etc. Relators focus on the fourth issue that was before the 5th Circuit. It concerned the validity of an order of the district court *restricting communications by named plaintiffs and their counsel with actual and potential class members* not formal parties to the suit. The majority found the order to be an unconstitutional prior restraint in violation of the First Amendment and Rule 23(d) Fed.R.Civ.P. 619 F.2d at 477-78.

The *Bernard* Court initially noted that the district court appeared to have acted upon the rationale of the model *Manual for Coxplex Litigation,* Part II, 1.41 (1973 Ed.) that the court has the power to enter a ban on com-

munications in any actual or potential class action as a prophylactic measure against potential abuses envisoned by the *Manual*. *Id.* at 466. The Court further scrutinized the order, stating that:

> It silenced the named plaintiffs and their attorneys during the period that Gulf's conciliation offers were outstanding and putative class members were considering whether to accept. A named plaintiff, questioned by the black employee working next to him concerning the suit or the relative advantages of conciliation award and suit, could not reply. The order cut off dialogue despite the contentions of plaintiff's counsel that some of the issues in the suit were not cured by the conciliation agreement to which plaintiffs and putative class members were not parties . . . . *It stopped investigation and discovery at a time when it is critical, just after suit has been filed.* (Emphasis supplied.)

Id. at 469-70. The Court found that the prior restraint on the speech of the litigants and their attorneys was not justified, and failed to overcome the "heavy presumption against its constitutionality," because (a) the record failed to sustain factual findings that the order was needed to prevent "direct, immediate and irreparable damage"; (b) the order was not the least restrictive means of accomplishing such an end; and (c) the Court failed to comply with required procedural safeguards in issuing the order. *Id.* at 473-78.

Applying a strict prior restraint standard, the *Bernard* Court held that the order is not brought within any exception permitting prior restraints merely because it arises in the general context of the administration of justice and the particular context of Rule 23. *Id.* at 474.

Relator Austin contends that the "prior restraint herein," as in *Bernard,* "sweeps too broadly" in that Austin's public officials are barred from discussing *all* information obtained through discovery, not just sensitive or prejudicial information. Further, relators both argue that their public officials, like the class plaintiffs in *Bernard,* represent the citizens of Austin and San Antonio and are responsible and accountable to those citizens respecting the disposition of this litigation. Relators claim their public officials are deprived of their First Amendment rights because they are barred from soliciting feedback on the basis of disclosure of relevant facts. Furthermore, Relator Austin argues that the residents of the City of Austin, like the deprived potential class of litigants in *Bernard,* are deprived of their right and obligation to monitor the workings of government and of the knowledge and counsel of their elected and appointed officials because of the protective order which was inappropriately described as a "gag order."

The Supreme Court affirmed the 5th Circuit decision in *Bernard* in Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981). Implicit in this opinion is a recognition that there are governmental proceedings which legitimately may be closed to the public and the press in order to protect the right of a defendant to a fair trial, where the Court said:

> In the conduct of a case, a court often finds it necessary to restrict free expression of participants, including counsel, witnesses, and jurors. Our decision regarding the need for careful analysis of the particular circumstances is limited to the situation before us—involving a broad restraint on communication with class members [in a Civil Rights Act class action, 42 U.S.C. 2000 *et seq.*]. We also note that the rules

> of ethics properly impose restraints on some forms of expression. See, *e.g.*, ABA Code of Professional Responsibility, DR 7-104 (1980).

452 U.S. at 104, n.21. *See also* Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978).

It appears fair to conclude that litigants and their lawyers have a First Amendment interest in disseminating information procured through discovery. Notwithstanding the line of authority to the contrary, it would also seem fair to conclude that the nature of this First Amendment interest is somewhat limited, and thus, a Rule 26(c) order, and arguably a Rule 186b order, restricting expression should not be evaluated by the stringent standards governing classic prior restraints.

This Court views the functions of the trial court regarding pre-trial discovery at this stage of the proceedings as a *discretionary matter* based on a strict reading of Rule 186(b). The respondent, the Hon. G. P. Hardy, had before him enough information to ascertain the nature and magnitude of the moving parties' interests, and, therefore, the protective intervention by the Court was justified.

The movants complain that, when the protective order was entered, they were denied an opportunity to contest its entry. The record shows conclusively to the contrary. Their attorneys were present and participated in the hearing which led to the entry of the order. Their counsel had advance notice of the matters to be considered at the hearing and had copies of the proposed order. Although Austin and San Antonio responded to the Judge's request for comments and suggestions, neither made complaint concerning the propriety of taking ju-

dicial notice of any facts which would support the order. Their counsel remained silent throughout the hearing, making no objection to the invocation of TEX.R.EVID., Rule 201 by the trial judge. Neither of the cities nor any of the moving parties requested an opportunity to present evidence or voiced any objection to the court taking judicial notice that Bay City, where the court sits, is in close proximity to the nuclear project involved in the litigation and that the issues involved in the case are unusually emotional in nature. We find no error has been demonstrated nor any abuse of discretion shown. *See generally* Skinner v. HCC Credit Co. of Arlington, Inc., 498 S.W.2d 708, 711 (Tex.Civ.App.—Fort Worth 1973, no writ).

Having considered the entire record and the authorities called to our attention, we find no error was committed by the eminently qualified trial judge in the entry of the protective order. All relief sought by the moving parties is denied. Each application for relief is refused.

QUENTIN KEITH
Justice

Opinion delivered and
filed this the 12th
day of April, 1984.

APPENDIX C

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Garson R. Jackson, Clerk

October 17, 1984

RE: Case No. C-3253

STYLE: COX ENTERPRISES, INC. d/b/a THE AUSTIN AMERICAN STATESMAN v. HON. G. P. HARDY, JR., JUDGE ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled relator's motion for leave to file petition for writ of mandamus in the above styled case. (Justice Gonzalez not sitting.)

Respectfully yours,

Garson R. Jackson, Clerk
By: Blanca E. Morin
Deputy

APPENDIX D

NO. 81-H-0686-C

IN THE DISTRICT COURT OF
MATAGORDA COUNTY, TEXAS
130TH JUDICIAL DISTRICT

HOUSTON LIGHTING & POWER COMPANY, INDIVIDUALLY AND AS PROJECT MANAGER UNDER THE SOUTH TEXAS PROJECT PARTICIPATION AGREEMENT BETWEEN THE CITY OF SAN ANTONIO, TEXAS, CENTRAL POWER AND LIGHT COMPANY, HOUSTON LIGHTING & POWER COMPANY AND THE CITY OF AUSTIN, TEXAS, EXECUTED AS OF JULY 1, 1973, AS AMENDED, ET AL.

VS.

BROWN & ROOT, INC., ET AL.

COURT HEARING

October 11, 1983

Second Motion for Summary Judgment

and

Auditor Motion

(p. 8) read.

The Court: Well, as to this B1, overruled, period; because I think all of the other rights—your right to renew it and reurge it come to you anyway, because I have had them reurged to me a dozen times throughout a trial, so I don't think you are cut off from that.

Mr. Cowan: We need it as "interlocutory as possible," Your Honor.

Mr. Reasoner: Let me say that I draw some comfort from the fact that Your Honor said that he recognized at this time that I could reurge it, while Mr. Kronzer has restrained me from doing it today.

The Court: Well, as I say, I'm not right sure how far our discovery is going to go. It depends upon what method I have to use to shorten some of our discovery and not allow fishing expeditions on the side of either party.

All right, gentlemen. I guess we can get on with the Second Motion.

Mr. Kronzer: Judge, before you start—and the matter that I only raise again incidentally by letter to the Court, inquiries were made, as I think you know from a letter addressed to the Court, concerning depositions and the availability by the news media or to the news media to the depositions.

Obviously, matters that are on file in the way of (p. 9) pleadings are available to them, but I see no reason that deposition materials should be made available, and so I suggested that we probably could obtain an agreement that those be kept in camera.

The Court: Well, I'll just stop that right here, because that's testimony in the case when it becomes a deposition—or possibly it's testimony, and certainly it ought not to be released to the media by either side.

Mr. Kronzer: Well, you can make the statement in the record as to this being under a Rule 166 proceeding that they shall be kept in camera.

The Court: Well, I think they should, because if the depositions are sealed in the clerk's office, they certainly can't get that information from the clerk's office; they have to get it from some attorney.

Mr. Kronzer: Well, again, I would say an instruction to us and all counsel not to turn them over to the press or copies—

The Court: Well, I'll instruct both sides. I don't want to make it appear that this rule applies unilaterally —I think it should apply bilaterally to both sides that no evidence should be given to the media.

Mr. Kronzer: That's fine with us.

Mr. Cowan: HL&P will agree with that, Your Honor.

(p. 10) Judge, while we are on the subject—

Mr. Meyer: Your Honor, I am not sure I can agree to that on behalf of San Antonio, and I'm not trying to be difficult, but if I send those depositions to my client and they go on file—I'll have to go back and look at the Freedom of Information Act—but, insofar as I know, the press regularly goes through everything that is on file in my client's office, including my fees.

The press has a perfect right to go over there and receive every statement I have ever sent to the Board and go through it and everything else that has been filed over there.

The Court: Well, I will just make it in the form of an Order that they will not touch the depositions.

Mr. Meyer: Could I brief the Court on the applicability of the Freedom of Information Act?

The Court: You can brief me. I probably won't change my mind.

Mr. Meyer: Thank you.

Mr. Cowan: Judge, while we are on housekeeping chores, we have an Agreed Protective Order with respect to the Bechtel records, that I think has been approved by counsel for all parties.

If we could pass that along to your Honor and get it approved, we would appreciate it.

(p. 11) The Court: All right. As a matter of fact, while I would be glad to see your brief or your authorities on what you have to say about the Freedom of Information Act—and I certainly reserve the right to—

Mr. Meyer: I just don't want to get sideways with the Court on this. I know how the press treats my client, is all I am saying.

The Court: Well, would they treat you the same way? You don't necessarily have to—

Mr. Meyer: No. I have had no contacts with the press. I represent that. Nor will I have any.

Nor does the press have the option of interviewing me or going through my office files, but they don't treat my client that way. That's all I am saying.

The Court: Well, perhaps those depositions should be returned to you immediately after your client reads them. If they are in your files, they can't be touched.

Mr. Kronzer: Judge, Section 3(A)(1) of the Act expressly provides for judicial powers to prevent encroachment under the Act.

The Federal Constitutional inhibitions are another thing, if they are actually filed; but if you order them not filed, the Texas Open Records Act does not require it, and a special exception under 3(A) (1) prohibits the (p. 12) inquiry.

The Court: Well, if they are not available in the clerk's office, they are under seal, and they are not opened until we try this case. I can't go in there, and I wouldn't dare go in there and open one of these depositions and look at it. I don't know what the result of that might be.

But I imagine I would hear a lot of screaming about it. "Who opened the depositions?"

Mr. Kronzer: We are not interested in filing them for public examination anywhere.

Now, we recognize that, as with the other Protective Orders, certain witnesses have got to examine them for purposes of their testimony—and that's a fact.

But just to turn them over, file them with a fee statement, that it says he has to do. If he wants to present some authorities to the Court, that's fine. We would like the opportunity to respond to that. But, in the meantime—

The Court: Well, we will take a look at your authorities, Mr. Meyer.

Mr. Meyer: I need to be very cautious, Your Honor, in my handling of this, and I think in my handling for my client.

The Court: Well, I think you have preserved your protection by raising the question, and if I go around you, (p. 13) perhaps that will protect you and put me on the firing line.

Mr. Meyer: Yes, Your Honor. Thank you, Your Honor.

Mr. Heiden: Your Honor, on behalf of myself and Bill Vernon, I would like to echo the comments that Mr. Meyer has made on behalf of San Antonio.

Our client is in some respects similarly situated and similarly constituted.

The Court: All right.

Mr. Kronzer: I would say even more so.

The Court: All right, gentlemen. I guess we can proceed with our Second Motion.

Mr. Reasoner: Thank you, Your Honor.

I would like to introduce my colleague, Charles Schwartz, who is here.

I would like to introduce my colleague, Charles Schwartz, who has worked with me on this Motion.

The Court: All right.

Mr. Reasoner: Your Honor, our argument on this Motion is a limited one. We simply ask the Court to look at the Participation Agreement and the STP Contract with Brown & Root, and we submit that a reading of those contracts demonstrates that as a matter of law HL&P in its capacity as Project Manager was acting as an agent for the

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APPENDIX E

NO. 81-H-0686-C

IN THE DISTRICT COURT OF
MATAGORDA COUNTY, TEXAS
130TH JUDICIAL DISTRICT

HOUSTON LIGHTING & POWER COMPANY, INDIVIDUALLY AND AS PROJECT MANAGER UNDER THE SOUTH TEXAS PROJECT PARTICIPATION AGREEMENT BETWEEN THE CITY OF SAN ANTONIO, TEXAS, CENTRAL POWER AND LIGHT COMPANY, HOUSTON LIGHTING & POWER COMPANY AND THE CITY OF AUSTIN, TEXAS, EXECUTED AS OF JULY 1, 1973, AS AMENDED, ET AL.

VS.

BROWN & ROOT, INC., ET AL.

HEARING ON MONITOR MOTIONS

November 17, 1983

Morning and Afternoon Sessions

(p. 5) BE IT REMEMBERED that on this the 17th day of November, A.D., 1983, between the hours of 10:00 A.M. and 5:45 P.M., Monitor Motions and Agenda Items in the above entitled and numbered cause came on to be heard before the Honorable G. P. Hardy, Jr., specially appointed Judge of the 130th Judicial District Court of Matagorda County, Texas, and all parties, Plaintiffs and Defendants, appearing in person and/or by Counsel, announced ready; all preliminary matters having been disposed of, the following proceedings were had, viz:

(p. 6) P R O C E E D I N G S

The Court: I think the next matter for consideration is the Protective Order.

Mr. Kronzer: Your Honor, for the record, my name is James Kronzer. I am lead attorney for Halliburton Company. I have previously and on several occasions as shown by the transcript and by correspondence with the Court in formal hearings asked the Court for protective orders during the pre-trial process against the release of information developed during the discovery process. And the Court will recall oral statements made by the Court into the record on October 11th and in that connection and the request the Court made to draft an Order that would be protective of the pre-trial process and that has been done, and the Court has asked that we make certain changes, and we have a Protective Order, Halliburton does, that it would like to present to the Court for entry so as to prepare for this motion under Rule 186(b), and we believe the record clearly shows a good cause we've previously presented to the Court on numerous occasions.

If I may present this to the Court.

The Court: I think, first, gentlemen, I have other opposition.

Mr. Tate: Okay, Your Honor.

(p. 7) Mr. George: Okay.

Mr. Meyer: Your Honor, may I on behalf of San Antonio strenuously oppose the Order which I think was handed to me last night, first, on the grounds that it's San Antonio's position and firm belief that the issues in this case are clearly in the public domain and that no restraint whatsoever should be placed on their dissemination to the public, the ratepayers, and the voters in San Antonio.

I think more importantly we oppose the Order on the grounds it restrains the First Amendment rights of elected

and appointed officials of the City of San Antonio to carry out their lawful duties; and that by this Order's terms they will not be allowed to risk contempt of this Court to comment on the materials that I by duty of law must give them and report to them on. It's our firm belief those rights should not be restrained in any manner by this Order.

We also believe that the Order is overly broad; there's other relief available to Halliburton to achieve these same results. Further, that the Order places a restraint on the ability of counsel to prepare its case for counsel to discuss the case with those elected and appointed officials and as constituted we oppose it and believe it violates the Constitution of the United States (p. 8) and of Texas.

Thank you, sir.

Mr. Heiden: Good morning, Judge.

On behalf of the City of Austin let me repeat some things that I have said before.

First of all, I think I've told everyone from time to time that I have no personal intention or personal interest in trying this case in the media. By the same token my client firmly belives (sic) that it has a right and it has a duty to discuss the issues in the case because of the public nature, public financial and other nature, of those issues; and that they have an obligation and a right to discuss them in connection with various deliberative functions of the body public, including council elections, bond elections, future energy planning needs, considerations of whether to continue to participate in this project; considerations of whether or not to attempt to sell or dispose of Austin's interest in the project.

In addition to that, I am concerned that the Order as currently drafted may well interfere with the abilities of the lawyers to prepare the case for trial and also of the lawyers and the parties to settle the case, particularly settle the case on something other than an open and public record.

Thank you, Judge.

(p. 9) Mr. Reasoner: Your Honor, if I might—

The Court: I believe, well, Mr. Tate, you gentlemen are in opposition to, so I guess you'll have the right to close, Mr. Reasoner.

Mr. Tate: Yes, Your Honor.

Mr. George: Yes.

Mr. Reasoner: I'm just not very quick, as you know, Judge.

Harry Reasoner for Brown & Root. We do wish to join Halliburton in the motion.

I would like to make a couple of comments, Your Honor. First, I think Your Honor has made very clear on the record that his only intent in considering an Order of this kind is to protect the right of fair trial and that the Order, as I understand Your Honor desires to enter, should be no broader than that, and I would urge before Your Honor enters an Order that Mr. Heiden and Mr. Meyer and anyone else who thinks that this Order may be overly broad, may interfere with their efforts to prepare for trial, or others sit down, give Your Honor the benefit of their candid remarks as to how the Order might be narrowed so that all that it does is protect the right of fair trial.

Certainly, Brown & Root is perfectly happy to participate in a discussion to make that Order as narrow as (p. 10) possible. I further wish to say, Your Honor, that the assertions that there is something peculiar about this case or that there is anything shocking or remarkable about the Court entering a Protective Order do not ring true.

The City of Austin's attorneys, the City of San Antonio's attorneys joined the other STP owners in asking Your Honor to enter a Protective Order that protected all evidence of Bechtel's current activities on the site. They stressed to Your Honor the importance of a Protective Order and that Protective Order is on file, signed by attorneys for all STP Plaintiffs.

Those same attorneys, Your Honor, in opposing our Monitor Motion asked the Court to hold a private, confidential hearing where even some of the Brown & Root lawyers could not attend while the Court considered the Monitor Motion.

Halliburton—excuse me, HL&P has asked for confidentiality Orders as has CP&L. There's no question like in other kinds of litigation, an Order to protect the legitimate interests of the parties or the rights of a fair trial that this Court should consider appropriate Protective Orders.

Now there's no intent, as I understand it from the Court, what the Court has observed, and certainly no intent on any of the parties, to prevent attorneys from (p. 11) Austin and San Antonio from communicating fully and freely with their clients. All that we ask is that their clients, as our clients, and any litigant, conduct themselves

in a fashion where they do not interfere with the constitutional right to a fair trial and where they do not through media or public relations attempt to give out information or to submit evidence to unfair construction and interpretation in a way that would usurp the rights of the Court and the jury.

And that's all that's before Your Honor, there's no attempt to interfere with the right of free press, no attempt to interfere with the right of San Antonio and Austin to conduct this litigation, just as they conduct all other litigation. Cities have no special privilege to attempt to prejudice or try cases in the media.

And I respectfully submit that Your Honor not enter an Order at this time, that he hear whatever objections or observations anyone has about how it might be narrowed to make it accomplish that one thing, which I think it is Your Honor's duty to do, and that is, to protect the integrity of the judicial process.

Thank you.

Mr. Cowan: Your Honor, if I could just correct Mr. Reasoner on one point, it's not a major point, but the request that the discussions concerning the Monitor Motion (p. 12) be held in camera were HL&P's request, not those of San Antonio or Austin—

Mr. Meyer: That was not at the request of San Antonio.

Mr. Cowan: —so I would like to correct Mr. Reasoner; I'm the one that was responsible for that.

The Court: I don't think they were even parties. I don't care whether it was monitored or not.

Mr. Wray: May it please the Court, in behalf of Central Power & Light Company, let me say that we recognize the Court's duty to afford the parties a fair trial and we are confident that any orders entered by the Court will be responsive to that need only; and I know it's not an easy thing to draft an Order and I would recognize that the Court has struggled with it and perhaps will continue to struggle with it this morning.

I think that in any lawsuit there are certain things which are entitled to be held in confidence, that is, trade secrets and things of that sort; that's not the ordinary sort of thing we're talking about, this is a broader issue.

One thing I would like to say which is not perhaps directly to the point, but which may ultimately become one of the points, I seriously doubt that media coverage of this lawsuit will have any substantial effect (p. 13) on the ability of the Court to grant a fair trial, and my reason for saying that is this, it is an enormously complicated case, which when a jury is empaneled will take weeks and perhaps months to try. We have to assume the jurors are going to follow the Court's instruction and whatever the jurors' have read in the newspaper or seen on TV is going to fade into insignificance when they are faced with weeks or months of hearing detailed evidence under the Court's direction.

I'm not saying the Court should not direct any—should not exercise any proper control over the dissemination of whatever the Court feels is confidential, but I am also saying that it is my conviction, personal conviction and my

client's position, that we can get a fair trial of this case in Matagorda County, whether the media is permitted access to the records of this case or not.

The Court: I believe you represent—

Mr. Tate: Your Honor, my name is Richard Tate, and I represent the Houston Chronicle Publishing Company. I appreciate the opportunity to appear before the Court this morning.

We've not had the opportunity to review the draft of the Order that Mr. Kronzer has just submitted to you, but we reviewed an earlier draft and it's our understanding, Your Honor, that as that Order is (p. 14) constituted it clearly would encompass an advance timing that the depositions, the answers to interrogatories, the answers to requests for admissions in this case would be confidential and as such, Your Honor, would be a clear prior restraint on the press and would exceed any bounds of an appropriate Order under Rule 186(b).

Depositions and interrogatories, Your Honor, have been consistently held to be judicial records and, therefore, presumptively public.

It's our position, our strong position, Your Honor, that there's a constitutional and a common law right of the public through its representatives of the press to access those documents. Any abridgement of that right, Your Honor, would be subject to the closest and strictest scrutiny.

There would have to be on behalf of these parties—Mr. Kronzer indicates there has been a showing of—while not having conducted a complete review of the records,

it is our understanding there has been no showing today and certainly no findings by the Court today which would, first of all, find that all the records are confidential after reviewing those records, that findings should be made after the review of the records.

Secondly, Your Honor, a showing of an irreparable injury to the producing party must be made and, then, after (p. 15) those showings are made and in fact findings are made by Your Honor, there must be a weighing of those interests against the public interests.

And on behalf of the Chronicle, Your Honor, we submit to you that there is no more newsworthy event to come before the civil courts of this state than the subject matter of this lawsuit before this Judge and this Court.

Therefore, Your Honor, if after weighing that issue you find that some sort of Protective Order is in fact needed, we would urge Your Honor, first of all, to consider a less restrictive means. As counsel has discussed this morning, there are less restrictive means of protecting documents with proper orders under Rule 186(b).

The precedents would show the Court that you have to select—the Court should select the narrowest means possible, the narrowest available rule in Order to provide the protection needed by the parties, and yet not damage and not infringe the public's right to know about this most important public issue.

Your Honor, there are a few civil cases in Texas on the point; there are some criminal cases, which would be instructive to the court which we will be happy to provide the Court with briefs on.

The Court: *Jackson BD&O cases?*

Mr. Tate: Well, there are in fact criminal cases (p. 16) from the Court of Criminal Appeals.

. . . and in addressing those questions, Your Honor, whenever our highest criminal Court has addressed the right of the public's access to judicial proceedings and judicial records, they've consistently held in Texas the right exceeds the minimum constitutional standards and in Texas the public has an even greater right to access the records of this Court.

The Court: Well, may I ask you this question? Did they not also hold that the State of Texas and the public generally were a party?

Mr. Tate: Well, Your Honor, that was a discussion but it was not a pivotal point—it was not a pivotal point in the decision. And certainly in this case, Your Honor, the citizens of Austin are parties, the citizens of San Antonio are a party, and I dare say, Your Honor, due to their financial interest, due to the rate pass-through the citizens of Houston should be considered to have a direct party interest in this thing because of their direct financial interest.

But, Your Honor, the more pivotal point is the right of the public to access these judicial records which have been consistently held by the Supreme Court of the United States and other courts to be presumptively public.

In closing, Your Honor, let me just say that the (p. 17) difference the courts have consistently held, that the difference between news and history is merely a passage of time, so in considering this, any sort of Protective Order

that might be entered, the importance of media access to deposition testimony, and answers of interrogatories on a timely basis should not be ignored by this Court.

We would request Your Honor—we know that Your Honor would like to have the benefit of a complete briefing on this subject, and we would request that Your Honor allow the newspapers to be able to be allowed to submit a brief. We have just this morning received a copy of Mr. Kronzer's brief and we would request the Court we be allowed to respond to that brief before the Court enters any ruling on this subject matter.

And, finally, Your Honor, we consider the Chronicle's obligation here to protect the right of public access of such grave importance that we consider it our constitutional duty to vigorously pursue access to those records, and for that reason we have appeared this morning and we appreciate the Court's indulgence in hearing us.

Thank you, Your Honor.

Mr. Kronzer: Your Honor, for the record, before Mr. George starts so we're not charged with waiver—

The Court: Well, I want to make this statement to both of these gentlemen from the press; they are here (p. 18) with, I would say, no standing whatever in the Court for the simple reason that they have not filed an amicus curiae or any other method of getting in the Court; but I advised them that they would be permitted to say their piece here this morning and if—possibly try to keep me from tripping my little foot.

Mr. Kronzer: I just want the record to show two things, we are opposed to any form of intervention. I let

Mr. George's firm know that; secondly, I believe that he to be competent in the conflict of interest as he stands before the Court.

Mr. George: Your Honor, let me address—my name is R. James George for the record. I'm here representing Cox Enterprises and the Austin-American Statesman.

We are here opposing the motion to have an Order, we have not been favored with, but I understand will restrict access by the public to any of the discovery documents, all deposition testimony, all interrogatory testimony, and all requests for admissions under all circumstances.

We are in the unique position in the City of Austin in this case. We believe the Court has had, I believe, a discussion of the case law that we believe pretty clearly establishes that it is the Court's obligation to take into consideration the public interest (p. 19) or the public character of potential litigation and any Order restricting access to information; the cases would range from an adoption or domestic case of some sort to a civil litigation where we believe this case is the absolute opposite extreme.

Let me address specifically the public interest we believe the Court is obligated to weigh before entering any sort of Order and that the evidence should be presented to be considered in that what public interest there is.

Speaking of the City of Austin and Austin only, my client circulates a daily newspaper predominantly in Travis County, Texas, and Austin, very little if any circulation in Matagorda County.

We have a situation in which the issues presented in this Court before a jury and before this Court have the

singlemost important effect upon the community, the City of Austin, which our newspaper is of any single issue, it is, we would show by evidence if there was a hearing at which evidence was presented by the other side of why there isn't a public interest in this litigation or of publicity, that would tender for the Court evidence that there have been seven elections in the City of Austin, as recently as January of 1983, to determine issues related to the City of Austin's participation and financing of the South Texas Nuclear Project.

(p. 20) Specifically, in January of 1983 I believe the evidence will be uncontroverted that there was an election to determine whether bonds should be issued by the City of Austin to finance the continued participation at the tune of approximately a million and a half dollars a week by the citizens of Austin, myself included, who happens to live in that city.

We have a city charter provision which nobody would contest that requires that before any additional bonds are issued that there be another election.

The evidence is clear that they'll run out of money in the Spring of '84, and there will have to be an election on this very issue, that is, whether or not the citizens of Austin should authorize the selling of additional hundreds of millions of dollars worth of bonds in Order to continue this participation.

Now, one of the issues in that election undoubtedly will be how well this lawsuit is going from the standpoint of the citizens of Austin, whether or not they are likely to recover any money from the defendants in this lawsuit.

You are as I understand it, the Court is being asked to enter an Order that would prevent the mayor of that city from telling the newspaper or myself as a citizen or anybody else in Austin that we have evidence in this (p. 21) case that such and such happened and we believe you should vote for those bonds and keep our participation in that 'cause we're gonna get the money back from these defendants. Although the people who are asked to pay the money back, the citizens, are not entitled to know that, the Court is going to prevent them from being told by the mayor, by the city councilmen, by the city attorney.

We have in our city this issue: this nuclear power plant represents an indebtedness, sole indebtedness, of our city of approximately $400 million; we have a total bonded indebtedness of that city of approximately $1 billion. Forty per cent of all the debt of the City of Austin is represented in this lawsuit and what the people can get out of it the citizens have voted to sell their share. Part of their ability to carry out that mandate is how well this lawsuit will go.

Any Order such as being considered by this Court today will have the most drastic impact upon the public interest in the City that my newspaper serves of any possible Order because we can't discuss or get the information to the people—after all, the people who have to pay the bills, who handle this thing, are the residents of that city, they own the utility system and they have to pay the bills.

Right now 15 cents on every dollar they pay for (p. 22) utility costs goes to pay for this project right now and pay for the bonds. There is nothing more important.

Now we have no evidence that I'm aware of—and I've seen some of the transcripts of some of the proceedings, and I don't know of any evidence that has ever been presented of any good cause in this case, there is nothing suggesting that any Order need be entered, any additional Order, to protect confidential information in the sense of trade secrets or embarrassing private facts about some individual's life. No, we have no evidence of that; in fact we have no evidence at all that any person in Matagorda County has read anything about this project. We have no evidence here that has been presented to support a motion for Protective Order to show good cause of any sort that there has been any publicity in Matagorda County.

We have litigants who are in Houston, in Corpus Christi, and San Antonio and Austin, tens and sometimes hundreds of miles away; there are, I believe, approximately 37,000 people that live in Matagorda County; there is not even a hint that you can't find 12 qualified jurors to sit in this case and fairly pass upon the issues.

As a spokesman from the Central Power & Light from Corpus Christi so aptly put it, there is no evidence and no suggestion that anybody's fair trial rights are going to be denied because you can't get a fair jury.

(p. 23) Now the Court is asked to enter this Order on nothing; Mr. Kronzer has presented no evidence, no records, no wave of publicity that's likely to prejudice the jury pool and, moreover, as the spokesman from Central Power & Light put it, we have a case here unlike any case that I've ever seen a restrictive Order entered in any of the books; we don't have a case in which we have a dra-

matic, notorious murder, we have a confession that is a key to the case; we don't have a simple set of facts that a potential jury may remember for several months; we have a complicated case in which there are dozens and dozens of depositions, dozens of witnesses involving the conduct of many people in a highly technical area over many years.

The risk in that kind of case that somebody—that there will be jurors out there that will be prejudiced against one party or the other and can't fairly rule on it, with the effective voir dire that Mr.—lawyer of the caliber of Mr. Kronzer or Mr. Reasoner can elicit is simply unsupported; these lawyers are among the best in the country; they can ask jurors questions and protect their clients quite amply; and if they are found that they can't then they have other remedies available to them. And before any Order restricting not just the freedom of the press, Your Honor, but the freedom of the City of Austin, the mayor, the city councilmen who talk to the people, to (p. 24) me, the people in that city, about what's happening in their lawsuit, is entered, something serious and important, and highly probative evidence ought to be presented that somebody's risk of fair trial is really at issue; Mr. Kronzer has spoken, Mr. Reasoner has spoken, "All we want is a fair trial." They have not shown anything that would keep them from having it.

We have cases and would like the opportunity to share other cases with you that the Court hasn't seen. The cases in this area can be fairly summarized as holding generally that a serious showing has to be made that somebody's right to fair trial is really at risk, and the Court has to make specific findings of facts as to why and

to tailor its Order to be as little restriction as possible to protect that right of fair trial. None of that's been done. Here today, no Order should be entered because there is no record to support it.

Thank you for the opportunity to address the Court, Your Honor.

Mr. Kronzer: Your Honor, may I—at this reluctant time—take the time responding to absent counsel, but I can't imagine more good cause than what Mr. George stated to you when he said they need this to formulate opinions for a political body to sell bonds.

Now if there is any greater reason for the need (p. 25) to protect the right of fair trial of the litigants before we even start introducing evidence, I'll never be able to offer it to you, Your Honor; that's probably the finest good cause I've ever heard stated for a proper Protective Order.

Now, let me talk about something that's developed since the filing of my brief and then I'll sit down. Mr. George has had the good fortune to be in one of the other cases that comes closest in Texas to dealing with that subject, and I didn't have it in the brief and it's found in the Court of the District Court Opinions in 535, Fed. Sub. 765; it's *Murray v. Leach,* and it arose in this way, Your Honor; it involved some problems over alleged guilty mismanagement of a national bank in Lufkin and a number of pleas to the jurisdiction and, oh, I guess, disqualify counsel; and apparently a pretty hotsy-totsy piece of litigation over there.

During the hearings we have never tried to keep anybody from any of these hearings; neither has the Court and certainly you won't in the trial proper.

In this case the trial Judge on exactly the same things that are being said to you, Mr. George's client, the Lufkin paper, was ordered out of the courtroom so they could conduct this hearing in camera, ran got his boss, came back, demanded his presence, were not given it. The (p. 26) Judge had not other reason other than there was gonna be a lot of stuff that might hurt the national bank institution's reputation. Same argument from me, arguments were made in that case that the State Constitution guaranteeing the right of open trial was guaranteed second, that the common law rights were guaranteed in Texas through Article 1; all of these were carried forward, and the 1st and 14th Amendments to the United States Constitution were guaranteed to let them have access.

They presented a Petition for Writ of Mandamus to the Supreme Court of Texas, and that was denied on those very grounds; not only are they laid out in Judge Peavy's Opinion that they did so, but we have the briefs in that case if you care to look at them.

Going a step further, they've cited in one of their two letters to the Court the opinion of the *Houston Chronicle Publishing v. Shaver* by the Court of Criminal Appeals.

That case, Your Honor, just expressly distinguishes between a civil and a criminal trial and control of pretrial matters as distinguished from in-trial proceedings, and it does not require that heavy weighing of balance.

The real truth of the matter is this: that the most recent case on the subject is by the Supreme Court of (p. 27) Washington en banc in *Rinehart v. Seattle Times*, and it contrasts with the two to one opinion of the District of Columbia Court of Appeals in which the type of rule that Mr. George contends for was announced, the Supreme Court has granted a writ to review that decision on October 4th of this year.

But there are many distinctions between Rinehart and this case that will be pointed out in our brief. We think, Your Honor—and I'll sit down and be through—if ever good cause was presented or needed in a case as he says of such magnitude was gonna be polarized and popularized in such manner as they would have it done, that we need no more presentation of evidence for that purpose.

Mr. Heiden: Your Honor, let me respond quickly, if I could to one concept both Mr. Reasoner and Mr. Kronzer brought up, they talked about the concept of a fair trial and the City of Austin is, I believe, at least as interested in preserving the concept of a free trial as the defendants, and the concept of a fair trial is one of the most cherished traditions that we have.

Seems to me, though, that one of the principal ingredients of that cherished tradition has been the tradition that a fair trial meant, among other things, open and public proceedings and for the most part including pretrial proceedings; and to sum up everything that I (p. 28) believe it is felt by the City of Austin that all those open and public proceedings can be reduced to one big question that's in the minds of everyone in Austin, voters, elected officials, ratepayers, "What has happened to the more

than $400 million cash that the City of Austin has already paid for this project?"

Thank you, Judge.

Mr. Reasoner: Your Honor, if I might make perfectly clear, which apparently I have not, we have never asked Your Honor to close off any pre-trial proceedings, STP's Project Manager did; we do not and we have no intention of it; we have no intention of asking Your Honor to close off the trial.

The cherished traditions of open and public proceedings which Mr. Heiden refers to are certainly not opposed by Brown & Root. All that is at issue here, Your Honor, as I understand it, is where the people can take allegations, evidence of which Your Honor has not ruled on the admissibility, and offer speculations to the press about their content, which apparently is exactly what Mr. George has in mind. I'm confident Mr. George—trial lawyer of Mr. George's caliber—would be taking the other position if he were trying to insure that a trial was decided and the jury considered admissible evidence as it properly should.

(p. 29) Thank you, Your Honor.

The Court: Isn't there also a lawsuit on file in Travis County involving some of the parties involved in this?

Mr. Kronzer: *City of Austin v. Houston Lighting & Power,* Your Honor, but it remains relatively quiet for reasons we don't understand, Your Honor.

Mr. Heiden: Yes, Your Honor.

Mr. George: May I add one point for the record, one of the other problems that your comment has raised

about any restrictive Order in this case is efficacy, whether it will work or not, and we have—much of this evidence, I understand, much of the testimony, and other things that go on will be presented before the Public Utilities Commission in Austin in various forms, much evidence of various shades or faces of the same thing that may be in some of these depositions may be presented in another lawsuit in Travis County, and much of it may be presented in another proceeding in the Nuclear Regulatory Commission.

Obvious principle of equity of course shouldn't mean something that's useless. Now what comes out will be bits and pieces. This Court can enter an Order that will keep all the publicity down and therefore could enter an Order that gives part of the picture, promotes distortion, (p. 30) not accuracy.

The Court: Well, I would like to make this comment, Mr. George, I know—as I practiced law a little while and been on the Bench some time, and if any party or person could predict the outcome of a lawsuit I would sure like to hire him, but I don't think that would be of much benefit to you. Horseracing and jury trials are about the same thing: you can't predict them; I've tried and it just doesn't work.

But, at any rate, gentlemen, I don't mind to give the gentlemen of the press time to send me some briefs.

How soon can you gentlemen get those in?

Mr. Tate: A week, Your Honor.

The Court: That will be fine.

Mr. George: That will be fine. If we might, could we be served with a copy of the proposed Order?

The Court: Well, I've not accepted the proposed Order yet and I am accepting the idea that the people involved in this lawsuit will discuss this Order further to see just exactly how they would accept—some kind of a protective Order will be entered, and at that time we will also provide you with a statement or release or whatever with regard to that Order.

Mr. Tate: Your Honor, may I ask, since one week is Thanksgiving, that we have until the Monday following (p. 31) Thanksgiving?

The Court: Oh, sure, yes.

Mr. Tate: Thank you.

Mr. Cowan: Would it be appropriate to pass on to the third item on Your Honor's agenda at this time?

The Court: I think so.

Mr. George: May we be excused, Your Honor?

The Court: Yes, sir. Thank you very much.

Mr. Cowan: Your Honor, in early November you very wisely asked counsel to negotiate and agree upon an agenda. Mr. Soules and Mr. Reasoner and I met on either November the 3rd or 4th, attempted to accomplish that purpose.

The letter that I wrote to Your Honor on November the 4th, copies to all counsel, are a result of those discussions.

The first basic problem, Your Honor, as we see it, from the plaintiff's point of view is to request Your Honor's assistance in solving the number of problems relating to the assertions of privilege.

We would like to ask Your Honor to go at it this way: first of all Mr. Heiden would like to share with Your Honor the basic factual frame of reference in which these questions arise; Mr. Workman would like to describe for you the height, breadth, depth and what we think is the

* * *

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No. 84-1156
No. 84-1186

In The
Supreme Court of the United States
October Term, 1984

COX ENTERPRISES, INC. d/b/a
THE AUSTIN AMERICAN-STATESMAN
and
HOUSTON CHRONICLE PUBLISHING COMPANY,

Petitioners,

v.

THE HONORABLE G. P. HARDY, JR., DISTRICT JUDGE, 130TH DISTRICT COURT, MATAGORDA COUNTY, TEXAS, SERVING BY SPECIAL APPOINTMENT,

Respondent,

BROWN & ROOT, INC. and THE HALLIBURTON COMPANY,

Real Parties in Interest.

BRIEF OF REAL PARTIES IN INTEREST IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

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February 14, 1985

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QUESTION PRESENTED

Whether a protective order based on good cause applying only to pretrial discovery materials and permitting public access to all hearings and any material upon which any judicial decisions are based meets the standards set forth by this Court in *Seattle Times Co. v. Rhinehart*, 104 S. Ct. 2199 (1984)?

PARTIES TO THE PROCEEDING BELOW

The Petitioner in No. 84-1156, Cox Enterprises, Inc., was the Relator in *Cox Enterprises, Inc. v. Hardy,* No. C-3253, in the Supreme Court of Texas.

Petitioner in No. 84-1186, Houston Chronicle Publishing Company, was the Relator in *Houston Chronicle Publishing Co. v. Hardy,* No. C-3400, in the Supreme Court of Texas.

The Respondent in both cases in the Supreme Court of Texas was the Honorable G. P. Hardy, Jr., District Judge of the 130th District Court, Matagorda County, Texas, serving by special appointment.

The Real Parties in Interest in both cases in the Supreme Court of Texas were Brown & Root, Inc., and the Halliburton Company.

Brown & Root, Inc. is a wholly-owned subsidiary of the Halliburton Company. A list of Brown & Root, Inc. and Halliburton Company subsidiaries (except wholly-owned) and affiliates is contained in the appendix to this brief.

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No. 84-1156
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In The
Supreme Court of the United States
October Term, 1984

COX ENTERPRISES, INC. d/b/a
THE AUSTIN AMERICAN-STATESMAN
and
HOUSTON CHRONICLE PUBLISHING COMPANY,

Petitioners,

v.

THE HONORABLE G. P. HARDY, JR., DISTRICT JUDGE, 130TH DISTRICT COURT, MATAGORDA COUNTY, TEXAS, SERVING BY SPECIAL APPOINTMENT,

Respondent,

BROWN & ROOT, INC. and THE HALLIBURTON COMPANY,

Real Parties in Interest.

BRIEF OF REAL PARTIES IN INTEREST IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TEXAS

STATEMENT OF THE CASE

The respondent, the Honorable G. P. Hardy, Jr., a district judge who has served some 35 years, presides by special appointment over the massive South Texas Nuclear Project litigation. *Houston Lighting & Power Co., et al. v. Brown & Root, Inc., et al.,* No. 81-H-0686-C (130th Dist. Ct., Matagorda County, Tex.). The case was filed on

December 16, 1981, and has already resulted in a record of some 3,100 pages of transcripts of pretrial proceedings and some 1,600 pleadings and briefs comprising thousands of pages of records. Over 109,000 pages of deposition transcripts have been received and a large number of depositions remained to be taken. Defendants have produced some 23.7 million pages of documents and plaintiffs have produced some 6.2 million pages. To visualize the magnitude of this production, if copies of the documents were stacked, the pile would reach almost two miles in height. Substantial document production remains to be completed. At least 100 lawyers are actively engaged in pretrial preparation.

The protective order considered here was entered after both petitioners and the parties to the suit were given full opportunity to be heard. Four of the six parties to the suit consented to the entry of the order. Petitioners, Cox Enterprises, Inc. and the Houston Chronicle Publishing Company, appeared at the November 17, 1983 hearing during which the protective order was considered. Neither petitioners nor any party to the suit sought an opportunity to present evidence. Neither petitioners nor any party objected to the propriety of the trial court taking judicial notice of the evidentiary facts underlying its finding of good cause for the entry of the protective order. Under Texas law they thereby waived the right to complain of the lack of an evidentiary hearing on those matters.

The order is extremely limited and merely:

(1) Requires the attorneys for the parties to honor the provisions of the Texas Code of Professional

Responsibility governing comments to the media in civil cases;

(2) Requires the parties, their attorneys and assistants, and court personnel to refrain from disclosing to third parties information obtained through the Court's discovery processes; and

(3) Seals the depositions, interrogatory answers and other documents that are obtained in discovery and may be offered in evidence.

It provides that:

(4) There shall be no limitation on access to hearings and evidence offered therein;

(5) There shall be no limitation on the media's right to publish information it has obtained or may obtain from other sources;

(6) There is no limitation on the attorneys' right to communicate with their clients; and

(7) The Court will entertain reasonable requests to modify the order.

The order specifically does not apply to:

(8) The pleadings, briefs and legal memoranda filed in this case.

The Cities of Austin and San Antonio and petitioners filed applications for writs of mandamus in the Court of Appeals for the Thirteenth Judicial District sitting in Corpus Christi, Texas. The Court of Appeals rendered an opinion comprehensively rejecting all of the arguments advanced by the objecting parties, including arguments concerning the use by Judge Hardy of judicial notice of the matters supporting the entry of the protective order. [App. 5-35; *Houston Chronicle Publishing Co. v. Hardy,* 678 S.W.2d 495 (Tex. App.—Corpus Christi,

1984).] Cox Enterprises, Inc., the Houston Chronicle Publishing Company, and the City of Austin thereupon renewed their applications for writs of mandamus in the Texas Supreme Court. Following extensive briefing, the Texas Supreme Court summarily overruled all applications.

———o———

REASONS FOR DENYING THE WRITS

I.

The Protective Order Meets the Standards Annunciated By This Court in Seattle Times Co. v. Rhinehart.

The decision of the court below is fully in accord with this Court's decision in *Seattle Times Co. v. Rhinehart,* 104 S. Ct. 2199 (1984). It raises no new issues for this Court's consideration.

A salient fact petitioners attempt to obscure is that the protective order entered here in no way limits petitioners' access to judicial hearings or to any evidentiary material upon which judicial action is based. Therefore, all of the cases that deal with limitations on access to judicial hearings—whether pretrial or during trial—are irrelevant. Judge Hardy's order makes clear that the public shall have full access to all pleadings, briefs, judicial hearings, and any evidentiary materials introduced in such hearings or, of course, later at the trial. As succinctly stated by the Court of Appeals, "Media representatives have only been denied *their claimed* right to root through a tremendous pile of undigested documentary evidence assembled during pretrial discovery proceedings by Judge

Hardy's order." [App. 15; 678 S.W.2d at 499 (emphasis in original).]

In *Rhinehart,* the Court upheld a protective order that, like the order here, prohibited disclosure of pretrial discovery materials. The Court held that "pretrial depositions and interrogatories are not public components of a civil trial." *Id.* at 2207. In reaching this conclusion, the Court cited Chief Justice Burger's concurring opinion in *Gannett Co. v. DePasquale,* 443 U.S. 368, 396-97 (1979). The Chief Justice stated:

> [D]uring the last 40 years in which the pretrial processes have been enormously expanded, it has never occurred to anyone, so far as I am aware, that a pretrial deposition or pretrial interrogatories were other than wholly private to the litigants. A pretrial deposition does not become part of a "trial" until and unless the contents of the deposition are offered in evidence. . . .
>
> For me, the essence of all of this is that by definition "pretrial proceedings" are exactly that.

The distinction between prohibiting disclosure of raw, undigested discovery materials and prohibiting disclosure of materials made the basis of a judicial decision is widely recognized in the case law. For example, in *Wilk v. American Medical Association,* 635 F.2d 1295, 1299 n.7 (7th Cir. 1980), the court observed:

> If the purpose of the common law right of access is to check judicial abuses . . . then that right should only extend to materials upon which a judicial decision is based.

Similarly, in *Joy v. North,* 692 F.2d 880, 893 (2d Cir. 1982), *cert. denied,* 460 U.S. 1051 (1983), the court stated:

> Protective orders are useful to prevent discovery from being used as a club by threatening disclosure of matters which will never be used at trial. Discovery involves the use of compulsory process to facilitate orderly preparation for trial, not to educate or titillate the public. . . .
>
> At the adjudication stage, however, very different considerations apply. An adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny.

See also United States v. Hubbard, 650 F.2d 293, 316-17 (D.C. Cir. 1980).

Cases relied upon by the petitioners, such as *Brown & Williamson Tobacco Corp. v. FTC,* 710 F.2d 1165 (6th Cir. 1983), *cert. denied,* 104 S. Ct. 1595 (1984), and *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation,* 101 F.R.D. 34 (C.D. Cal.), *mandamus granted,* 10 Media L. Rep. (BNA) 2430 (9th Cir.), *cert. dismissed,* 105 S. Ct. 768 (1984), are perfectly consistent with the protective order entered here. Both of these cases distinguish between raw pretrial documents and those documents made the basis of a judicial decision. In *Brown & Williamson,* the Sixth Circuit granted access to certain documents made the basis of a judicial decision because "court records often provide important, sometimes the only, bases or explanations for a court's decision." 710 F.2d at 1177.

Similarly, *Petroleum Products* is consistent with the order entered by Judge Hardy. In *Petroleum Products,* the documents at issue were documents on which a trial court intended to base a judicial decision. These documents included the parties' pretrial briefs, summary judgment briefs, and the supporting exhibits submitted to the

court. 101 F.R.D. at 43 n.9. The court specifically distinguished between the documents at issue and the "raw fruits of discovery." *Id.* at 38. All of the types of documents ordered released by the court in *Petroleum Products* have been and will continue to be available to the public in *Houston Lighting & Power Co., et al. v. Brown & Root, Inc., et al.* Nothing in Judge Hardy's order purports to exclude from public access any of the briefs, pretrial memoranda, or attached exhibits ordered released in *Petroleum Products*.[1] In fact, Judge Hardy's order specifically contemplates that such materials shall be publicly available.[2]

The Ninth Circuit's opinion lifting the temporary stay ordered by the trial court in *Petroleum Products* adds nothing to this analysis. The Ninth Circuit specifically relied upon cases that distinguished between pretrial documents and those documents made the basis of a judicial decision. The court stated:

> Unlike the situation in *Seattle Times Co. v. Rhinehart*, . . . the documents at issue here are not the raw fruits of discovery, but are public components of a civil trial.

10 Media L. Rep. (BNA) at 2431.

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1 Indeed, Judge Hardy denied the motion of plaintiff Houston Lighting & Power Co. to modify the protective order to require exhibits attached to briefs and motions to be filed under seal.

2 The other cases cited by the petitioners also involve only access to documents made the basis of a judicial decision. *See Publicker Industries, Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984) (closed hearing on motion for preliminary injunction); *In re Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir. 1984) (report of special litigation committee made the basis of a judicial decision); *Joy v. North*, 692 F.2d 880 (2d Cir. 1982), *cert. denied*, 460 U.S. 1051 (1983) (same).

The petitioners argue that the Court of Appeals distinguished erroneously between right of access in criminal cases and civil cases. Manifestly, the Court of Appeals made no such distinction. The Court of Appeals distinguished between access to judicial proceedings (a concept applicable to both civil and criminal matters) and access to the raw pretrial discovery involved here. *See* App. 13-18; 678 S.W.2d at 498-500. The Court of Appeals found the criminal cases relied upon by the petitioners to be inapposite since they dealt with the right of the public to attend judicial proceedings.

The only case cited by petitioners that involved pretrial documents in a criminal case, *Associated Press v. United States District Court,* 705 F.2d 1143 (9th Cir. 1983), is not remotely analogous to the present case. *Associated Press* did not involve discovery, but rather criminal "pretrial proceedings and the documents filed in regard to them." *Id.* at 1145. Here the documents analogous to those in *Associated Press*—pleadings, briefs, and exhibits to motions—are expressly open to public inspection under the protective order.

Cox Enterprises also argues that the Court of Appeals' opinion is in conflict with *In re San Juan Star Co.,* 662 F.2d 108 (1st Cir. 1981), and *CBS, Inc. v. Young,* 522 F.2d 234 (6th Cir. 1975), because Cox Enterprises alleges that the Court of Appeals denied the newspapers standing to challenge the protective order. However, the Court of Appeals made no holding that newspapers lacked *jus tertii* standing to attack protective orders. The Court of Appeals' decision is a direct consideration of the substantive issues presented.

Indeed, Cox Enterprises ignores that, as a substantive matter, both of these cases provide strong suppport for the order entered here. *San Juan Star* expressly affirmed an order prohibiting disclosure of deposition contents to the press or public. 662 F.2d at 1118. *CBS* struck down a protective order prohibiting the participants in the litigation from "discussing in any manner whatsoever these cases with members of the news media or the public." 522 F.2d at 236. In contrast, the present order applies only to the raw fruits of the discovery process.

II.

The Protective Order Was Entered With Good Cause Based on Proper Findings.

Similar to Fed. R. Civ. P. 26(c), Tex. R. Civ. P. 186(b) authorized the trial judge "upon notice and for good cause shown" to enter a variety of orders concerning discovery, including an order that, after being sealed, depositions "shall be opened only by order of the court," or "any other order which justice requires to protect the party or witness from undue annoyance, embarrassment, oppression or expense."

Both petitioners contend that the protective order was entered without a showing of good cause. The record belies such a contention. The petitioners assiduously resist acknowledging that Judge Hardy properly took judi-

cial notice under Texas law of factors that clearly supported the entry of the protective order.

Judge Hardy determined that the likelihood is great that potential jurors will be prejudiced by pretrial publicity in this case. That judgment was informed by more than three decades of judicial experience in the court in which this case will be tried and was supported by careful consideration of the particularized circumstances of this case, including: the small size of Bay City, Texas; its proximity to the South Texas Nuclear Project; the unusually emotional nature of the issues involved in the litigation; the pretrial status of the case; the complexity of the suit; and the enormous number of discovery materials involved. The court concluded that in these circumstances selective disclosure before trial of parts of an enormous volume of discovery materials could present materially false impressions as to the merits of the parties' claims and interfere with the right to a fair trial to which all parties are entitled.

These findings are undoubtedly sufficient to support the entry of a protective order and were made only after petitioners had full and fair opportunity to participate in the hearing of November 17, 1983, in which entry of the protective order was considered. Both petitioners had full opportunity to object to Judge Hardy's taking judicial notice of the factors enumerated in his order, but did not do so. As a matter of state evidentiary law, the Court of Appeals correctly held that petitioners waived their right to complain about the court's taking of judicial notice. *See* Tex. R. Evid. 201(e). [App. 34-35; 678 S.W.2d at 508.]

In *Seattle Times Co. v. Rhinehart,* this Court stated, "Rule 26(c) confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required." 104 S. Ct. at 2209. The Supreme Court of Washington in *Rhinehart* held that " 'good cause' is established if the moving party shows that any of the harms spoken of in the rule is threatened and can be avoided without impeding the discovery process." *Rhinehart v. Seattle Times Co.,* 98 Wash. 2d 226, 256, 654 P.2d 673, 690 (1982), *aff'd,* 104 S. Ct. 2199 (1984). This Court said of the Washington Supreme Court's determination, "It is sufficient for purposes of our decision that the highest court in the state found no abuse of discretion in the trial court's decision to issue a protective order pursuant to a constitutional state law." 104 S. Ct. at 2209.

Similarly, the Texas Supreme Court has found no abuse of discretion by Judge Hardy in the entry of this protective order under Rule 186(b), which plainly requires a showing of good cause.

Contrary to the petitioners' various assertions, good cause for entry of a protective order does not require certainty, but only "a reasonable likelihood" of injury to interests protected by the rule. Clearly, the parties' right to a fair trial is such an interest. Thus, *In re San Juan Star Co.,* 662 F.2d 108 (1st Cir. 1981), upheld an order preventing disclosure of deposition testimony since pretrial publicity posed "at least a reasonable likelihood of a material harm to defendants' right to a fair trial." *Id.* at 117.

Judge Hardy's reasons for entry of the protective order are firmly based in the case law. In *In re "Agent*

Orange" Product Liability Litigation, 96 F.R.D. 582, 583 (E.D.N.Y. 1983), the court agreed with the findings of a special master that good cause existed for the protective order due to the "complexity of this litigation, the emotionalism surrounding the issues, the number of documents yet to be reviewed and the desirability of moving discovery expeditiously in order to meet the June 1983 trial date." *See also Zenith Radio Corp. v. Matsushita Electric Industrial Co.,* 529 F. Supp. 866, 891 (E.D. Pa. 1981) ("good cause" for a protective order limiting disclosure of discovery documents is not susceptible to any "hard and fast rules").

The petitioners mistakenly argue that the entry of a protective order should be supported by findings similar to those made when the decision is to prohibit access to a judicial proceeding. The petitioners' argument is expressly rejected by this Court in *Rhinehart.* In that case, this Court stated that "no heightened First Amendment scrutiny" is necessary to support the entry of a protective order. 104 S. Ct. at 2209. This must be contrasted with the extremely heavy showing that must support a trial judge's decision to close a judicial proceeding to public attendance. *See Press-Enterprise Co. v. Superior Court,* 104 S. Ct. 819 (1984).

Last, we note that any course other than the one taken by Judge Hardy would make the litigation process a shambles. As discussed previously, the documents produced and the depositions taken in this case total many millions of pages. The petitioners concede that they do not seek access to any confidential materials. If Judge Hardy may enter a protective order protecting confidential business records or sensational or highly prejudicial informa-

tion, even the petitioners must concede that the parties have a right to have a determination made by the trial court of which documents are confidential or highly prejudicial. *See In re Coordinated Pretrial Proceedings in Western Liquid Asphalt Cases,* 18 Fed. R. Serv. 2d 1251, 1252 (N.D. Cal. 1974); *West v. Solito,* 563 S.W.2d 240 (Tex. 1978).

There are already 30 million pages of documents in this case. Assuming for the moment that Judge Hardy could efficiently review a single page of deposition testimony or other documentary material in one minute, it would take Judge Hardy 30 million minutes to review the pretrial documents covered under the protective order. If a 2,000-hour work year is assumed, it would take Judge Hardy 250 years to review the documents in order to protect confidential business information or sensational or highly prejudicial information from disclosure. The course undertaken by Judge Hardy has been routinely recommended in other large cases. *See In re Halkin,* 598 F.2d 176, 196 n.47 (D.C. Cir. 1979); *Zenith Radio Corp. v. Matsushita Electric Industrial Co.,* 529 F. Supp. 866, 889 (E.D. Pa. 1981).

Judge Hardy's protective order was carefully crafted. It expressly opens to the public all judicial proceedings. It exempts from the ambit of the order any documents submitted to the court for a judicial decision. The only materials not subject to public scrutiny at this time are the raw pretrial discovery materials that this Court has held do not constitute the public components of a civil trial.

———o———

CONCLUSION

The Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

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AMSITO Oil Wells Services (Malaysia) Sdn. Bhd.
Arabian Halliburton Service Company Limited
Barita de Santa Rosa S.A. de C.V.
Bentonita de Mexico S.A. de C.V.
Global Chemicals, Inc.
Halliburton India, Inc.
Halliburton Nigeria Limited
IMCO Servicios Y Manufacturas Quimicas
Marmin Trading & Supply Company
NUS Corporation
Oman Drilling Products Company, L.L.C.
Oriental Gold Co., Ltd.
Otis of Nigeria Limited
Otis-Saudi, Limited
P.T. IMCO Services Indonesia
Productos Industriales de Veracruz, S.A. de C.V.
Unibario, S.A.

Brown & Root, Inc. subsidiaries (except wholly-owned) and affiliates are:

Al-Rushaid Taylor Diving Ltd.
Brownaker Offshore A/S
Brown & Root—Alireza W.L.L.
Brown & Root Arabia, Limited
Brown & Root Constructores Petroleros de Venezuela, C.A.
Brown & Root do Brasil Servicos Maritimos Ltda.
Brown & Root—Egyptian Constructors S.A.
Brown & Root Ingenieros Petroleros de Venezuela, C.A.
Brown & Root—Kokan Offshore Constructors, S.A.
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Brown & Root—Malta Limited

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Brown & Root Nigeria Limited
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Brown & Root—Saudi Limited
Brown & Root—Wimpey Highlands Fabricators Limited
Burro Chief Copper Company
China Brown & Root Marine Engineering and Construction Company, Ltd.
COES-Brown & Root Marine Construction Company Limited
Concretos Industriales, C.A.
Constructores de Venezuela, Brown & Root, Inc., C.A.
Consultores Maritimos del Golfo, S.A. de C.V.
Contratistas del Lago, C.A.
Corporacion de Construcciones de Campeche, S.A. de C.V.
Deepwater Holdings B.V. (Formerly Trans-Marine Engineering & Equipment B.V.)
Diving Contractors (Malaysia) Sendirian Berhad
Durable Railway Track & Turnouts, Inc.
Equipos del Lago, C.A.
Getec, S.A. de C.V.
Jackson Marine (Dubai) Limited
Jackson Marine (Malaysia) Sdn. Bhd.
Jackson Marine Mashor Private Limited
Martec-Engenharia e Obras Ltda.
Moroccan Engineers & Constructors
National Marine Services, Ltd.
NKK-Brown & Root Overseas, S.A.
NUS Corporation
P.T. Brown & Root Indonesia
Parco Brown & Root, Inc.
Pearl River Sand & Gravel Company
Port Harcourt Oil Services Limited (Formerly Wimpey-Brown & Root (Nigeria) Limited)
Prestressed Concrete Products Company, Inc.
Raymond-Brown & Root, C.A.
Rezayat-Brown & Root E.C.

Sale Pipe Mill Pty. Limited
SBR Offshore Limited
Servicios Tecnicos Brown & Root, S.A.
Wilbar Offshore A/S